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Supreme Court of the United States

OCTOBER TERM, 1950

No. 443

SCHWEGMANN BROTHERS, ET AL., PETITIONERS,

vs.

SEAGRAM-DISTILLERS CORPORATION

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED DECEMBER 8, 1950.

CERTIORARI GRANTED FEBRUARY 26, 1951.

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UNITED STATES OF AMERICA.
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF LOUISIANA.

No. 2607 Civil Action.

SEAGRAM DISTILLERS CORPORATION,

versus

SCHWEGMANN BROTHERS, ET AL.

Appearances:

Messrs. Wisdom & Stone, John Minor Wisdom, Esq.,
Saul Stone, Esq., Paul O. H. Pigman, Esq., Attorneys
for Defendant-Appellant.

Messrs. Monroe & Lemann, Walter J. Suthon, Jr., Esq.,
Robert G. Polack, Esq., Attorneys for Plaintiff-Appellee.

APPEAL from the District Court of the United States for
the Eastern District of Louisiana, to the United States
Court of Appeals for the Fifth Circuit, returnable
within forty (40) days from the 17th day of January,
1950, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United
States District Court, Eastern District of Louisiana, bringing
the return day up to and including April 4th, 1950.

BILL OF COMPLAINT.

Filed Nov. 25, 1949.

(Number and Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:
Seagram Distillers Corporation, a corporation organized and established under the laws of the State of Delaware, brings this bill of complaint against Schwegmann Brothers, a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and said John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, individually, all of the full age of majority and domiciled in the City of New Orleans, State of Louisiana, and for cause of action plaintiff avers that:

I.

Plaintiff now is, and at all times hereinafter mentioned was, a corporation organized and existing under the laws of the State of Delaware, and a citizen and resident of that State, having its domicile and principle place of business at Dover, Delaware, and New York, N. Y., respectively.

II.

Defendant, Schwegmann Brothers, is, and at all times hereinafter mentioned was, a commercial partnership doing business in the City of New Orleans, State of Louisiana, and a citizen and resident of that State, composed of defendants, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, all of whom are citizens and residents of that State, having their domicile and principal place of

business in the City of New Orleans, Parish of Orleans, State of Louisiana, and within the Eastern District of Louisiana, in which place and in which district among others the acts herein complained of have been done by said defendants.

III.

The jurisdiction of this Court is based on diversity of citizenship, the matter in dispute and the amount in controversy, exclusive of interest and costs, being in excess of Three Thousand Dollars (\$3,000.00), and the object of this suit is to obtain an abatement of defendants' acts herein complained of and to enjoin and restrain recurring and continuing trespasses by defendants upon plaintiff's rights of property, its business, good will, trade marks, names, brands and labels identifying its commodities, which are all of a value and amount largely in excess of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

IV.

Plaintiff, Seagram-Distillers Corporation, is a wholly owned subsidiary of Joseph E. Seagram & Sons, Inc., an Indiana corporation, which parent company manufactures "Seagram's 7 Crown", "Seagram's 5 Crown", blended whiskeys, and "Seagram's Ancient Bottle" distilled dry gin and "King Arthur" distilled London dry gin, and owns the trade marks, "Seagram" and "King Arthur" which trade marks or trade names are registered in the United States Patent Office in the name of said Joseph E. Seagram & Sons, Inc.

Plaintiff, Seagram-Distillers Corporation, is the exclusive distributor for the State of Louisiana of the brands of whiskey and gin aforesaid, and also "Kessler's Private

Blend" blended whiskey, manufactured by an affiliate, Julius Kessler Distilling Co., Inc., an Indiana corporation, which owns the trade name, "Kessler"; and "Seagram's V. O.", "Seagram's '83'", blended whiskey, and "Seagram's Pedigree Rye or Bourbon" straight whiskey, manufactured by an affiliate, Joseph E. Seagram & Sons, Limited, a Canadian corporation.

Plaintiff, Seagram-Distillers Corporation, has been specifically authorized by each and all of said producers and owners of the aforesaid trade names and brands to establish and enforce minimum resale and retail prices in Louisiana under the Louisiana Fair Trade law of the above-mentioned trade-marked and named beverages.

Said beverage products are sold in Louisiana only to wholesalers who in turn sell them to retailers for resale to the consuming public. All such products purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce, shipments being made from and title passing at a point outside of the State of Louisiana. All orders for merchandise by its Louisiana customers are subject to acceptance by plaintiff's executive office in New York.

V.

Plaintiff for several years past has sold or distributed, and now sells and distributes, within the State of Louisiana, the aforesaid whiskies and liquors which bear, or the labels or contents or which bear, the aforesaid trade marks, brands or names. Said products or commodities have been and are in fair and open competition with products or commodities of the same general class produced by others. The products or commodities distributed

by plaintiff, and bearing its aforesaid trade mark, brands or names, are, and for several years past have been, sold at retail through liquor stores and other establishments dealing in liquors throughout the State of Louisiana, and elsewhere in the United States.

VI.

By advertising and otherwise, "Seagram" products, identified as aforesaid, for several years past have been and now are well recognized and established commodities, both nationally and in the State of Louisiana, and "Seagrams" products, so identified, now enjoy, and for several years past have enjoyed, a good reputation among dealers, retailers and consumers. Plaintiff has established a valuable good will and has expended large sums of money in the creation and development thereof, and at all times has endeavored to so market its commodities or products that they should be offered for sale within the State of Louisiana at reasonable prices, and to induce retailers to handle its products or commodities, plaintiff has endeavored to create a public demand for its products or commodities at prices which will yield a fair profit to retailers handling them.

VII.

Several years ago there developed in the liquor trade a practice of cutting prices on advertised products or commodities well known to the public and sold under distinctive trade marks, brands and names. Such products were offered by retail dealers at prices conspicuously lower than the marked or established prices of said products or commodities, as so-called "leaders" for the purpose of creating the impression that their goods, of which the prices were not well known, were sold at corresponding reductions

and that all articles dealt in by a particular retail dealer engaged in price cutting were sold by him at less than they could be obtained elsewhere, and for the purpose of attracting customers to such stores and away from other stores. The stores at which such practices were prevalent became known as "cut rate stores". Such practice of cutting well known and established prices engendered a condition by which other retail dealers were forced to meet the cut prices advertised by their competitors. One cut produced another in retaliation, so that ultimately in a particular community well known articles identified by trade marks, brands and names with established prices were offered at prices cut to a point which yielded no profit, and in many instances represented actual loss. Said price cutting resulted in the destruction of all incentive on the part of dealers to sell such commodities and in their consequent refusal to handle or to stock the same. As a further result of said price cutting, the producer or owner of such identified articles whose goods had been handled in this manner through no fault of his own, was deprived of a market and facilities for distribution and his business and good will seriously interfered with, and in many instances destroyed.

VIII.

The situation above set forth was particularly true in the State of Louisiana, especially with respect to whiskies and liquors, and had extended to other lines of merchandise. To remedy this evil and to safeguard the public against the creation and perpetuation of monopolies and to foster and encourage competition by prohibiting unfair and discriminatory practices under which fair and honest competition is destroyed or prevented, the legislature of Louisiana passed Act No. 13 of 1936, known as the "Louis-

iana Fair Trade Act". And, by amendment to the Sherman Anti-Trust Act, August 17, 1937, c. 690, Title VIII S 1, 50 Stat. (U. S. C. A. Title 15, S 1, Act 1937), it was provided:

"Provided, that nothing herein contained shall render illegal, contracts or agreements, prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented; Provided, further, that the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other."

IX.

Pursuant to the public policy of the State of Louisiana, evidenced by the said "Louisiana Fair Trade Act" and to the provisions thereof, and in order to protect itself, together with wholesalers, retailers and the consuming public against the injurious and uneconomic practices recog-

nized by the said "Louisiana Fair Trade Act", and particularly against the price cutting hereinabove set forth, plaintiff adopted a system of doing business which consisted of entering into a standard form of contract with retail dealers in the State of Louisiana, involving and concerning plaintiff's products and commodities, bearing plaintiff's distinctive trade marks, brands, names and labels, and obligating said dealers to sell plaintiff's said products and commodities only to consumers at specified prices. Plaintiff annexes hereto as part hereof said standard form of contract, marked Exhibit "A", being a true and correct copy of the form of contract above referred to. On or about April 1, 1948, plaintiff entered into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". On or about November 10, 1949, plaintiff sent telegrams to all retail liquor dealers operating in the State of Louisiana, a true and correct copy of which telegram is attached hereto as part hereof, marked Exhibit "B". Plaintiff, in addition, on or about November 11, 1949, entered into signed contracts with six retail liquor dealers operating stores in the State of Louisiana, including some in the City of New Orleans, on said form of contract marked Exhibit "A". On or about November 14, 1949, plaintiff sent or caused to be sent, through its New York office and Gulf States Beverage Journal of Coral Gables, Florida, by first-class United States mail with sufficient postage attached for their transmission to all of the retail liquor dealers throughout the State of Louisiana, including the defendants herein and other dealers in New Orleans, Louisiana, a letter in which was enclosed a schedule of its current minimum prices of products distributed by it in Louisiana. Said letter called attention to the fact that a number of fair trade contracts

were then in effect in Louisiana which made the resale prices shown on the enclosed list binding on the other retailers regardless of whether they had signed the contract with plaintiff or not. Plaintiff annexes hereto as part hereof a copy of said letter of November 14, 1949, and its said schedule of prices which accompanies said letter, which are clipped together and marked Exhibit "C".

X.

Plaintiff is informed and believes, and so believing, avers that notwithstanding the existence of its fair trade agreements with authorized retail liquor dealers in the State of Louisiana, and full knowledge thereof by the defendants, defendants have sold at retail to the consuming public, and continue to so sell, the commodities or products bearing the trade marks, names, brands and labels of plaintiff at prices below the minimum retail prices set forth in Exhibit "C". Defendants have, therefore, violated said "Louisiana Fair Trade Act" (Act No. 13 of the Louisiana Legislature of 1936), defendants having actual notice and knowledge of the existence of numerous such contracts between plaintiff and other Louisiana retail liquor dealers who observe said minimum retail resale schedules and who distribute plaintiff's products and commodities identified as aforesaid. Defendants have also had actual notice and knowledge of the minimum retail resale price of plaintiff's products specified in the attached documents marked Exhibit "A" and Exhibit "C", which have been and are now in force.

XI.

Subsequent to the aforesaid notices and prior to the commencement of this action, defendants, as plaintiff is in-

formed and believes and so believing avers, with full knowledge of the existence of plaintiff's contracts, and of plaintiff's minimum retail resale price schedule, and with the purpose and intention of interfering with and destroying the effects thereof, and in violation of the provisions of the "Louisiana Fair Trade Act", have knowingly and wilfully offered for sale and sold at retail, and are now so doing, certain of the products and commodities of plaintiff bearing the name, trade marks, labels, brands of plaintiff and mentioned and described in the exhibits hereto annexed, particularly the whiskey distributed by plaintiff and known as "Seagram's 7 Crown", at less than the minimum retail price stipulated in the contract and price list hereto annexed, and marked Exhibit "A" and Exhibit "C". Defendants have always had an opportunity to purchase said products on the same terms and conditions as other retailers and dealers. Plaintiff, on information and belief, avers the following specific instances of such conduct on the part of defendants:

(1) Defendants did, on or about 6:30 P. M., Monday, November 21, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one pint, at the cut price of \$2.20, plus sales tax of 7¢ or a total price of \$2.27, when the price of said one pint bottle of "Seagram's 7 Crown" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was \$2.68, plus sales tax of 8¢, or a total of \$2.76.

(2) Defendants did on or about 7:30 P. M., Monday, November 21, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one-fifth of a gallon, at the cut price of \$3.51, plus sales tax of 11¢, or a total price of \$3.62, when the price of said one-fifth of a gallon of "Seagram's 7 Crown" whiskey established in the fair trade agreements

between plaintiff and other Louisiana retail liquor dealers was \$4.24, plus sales tax of 13¢, or a total of \$4.37.

(3) Defendants did, on or about 7:30 P. M., Monday, November 21, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one-fifth of a gallon, at the cut price of \$3.51, plus sales tax of 11¢, or a total price of \$3.62, when the price of said one-fifth of a gallon of "Seagram's 7 Crown" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was \$4.24, plus sales tax of 13¢, or a total of \$4.37.

(4) Defendants did, on or about 10:45 A. M., Tuesday, November 22, 1949, sell a bottle of "Seagram's 7 Crown" whiskey, containing one pint, at the cut price of \$2.20, plus sales tax of 7¢, or a total price of \$2.27, when the price of said one pint bottle of "Seagram's 7 Crown" whiskey established in the fair trade agreements between plaintiff and other Louisiana retail liquor dealers was \$2.68, plus sales tax of 8¢, or a total of \$2.76.

XII.

Said wilful acts of the defendants are contrary to the provisions and spirit of the "Louisiana Fair Trade Act", and constitute unfair competition as to plaintiff, and all retail liquor dealers within the State of Louisiana, including those under contract with plaintiff. Said wilful acts of defendants have induced, coerced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff. In addition thereto, a further consequence of defendants' aforesaid wilful acts is that the buying public, including customers of all retail liquor dealers in the State of Louisiana, are misled and induced thereby to believe that plaintiff's products or

commodities sold by defendants are not worth the prices at which they are nationally advertised and sold, pursuant to plaintiff's minimum retail resale price schedules. Retailers other than the defendants cannot profitably market plaintiff's commodities or products at the prices at which said products or commodities are advertised and sold by defendants. A continuation of such acts by defendants will produce great and irreparable injury to plaintiff. It is impossible to ascertain the pecuniary loss which plaintiff has already suffered, and will suffer if the practices of defendants are permitted to continue. A continuance of such acts by defendants tends to result in irreparable loss of sales to plaintiff and the destruction of plaintiff's business and the good will pertaining thereto. Pecuniary compensation would not afford adequate relief to plaintiff, and it is necessary that defendants be restrained from continuing their wilful acts in derogation and violation of said "Louisiana Fair Trade Act" and of the rights of plaintiff thereunder as aforesaid, to prevent a multiplicity of suits. The wrongs complained of as above set forth imminently imperil and immediately threaten devastation of plaintiff's business, and destruction of plaintiff's good will, and multiple breaches, violations and cancellations of its said contracts with other retail liquor dealers throughout the State of Louisiana, and plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that, after due hearing and upon presentation to the Court by plaintiff of such bond as the Court may require and approve, the Court grant a preliminary writ of injunction enjoining defendants, Schwegmann Brothers, a commercial partnership, and John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, the individuals composing said partnership, their officers, agents, servants and employees, and all persons

acting in aid or in conjunction with them or any of them, pending final hearing or sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale, selling, or offering for sale, any of the products or commodities of plaintiff, Seagram-Distillers Corporation, bearing the names, trade marks, labels or brands of plaintiff, which said defendant, Schwegmann Brothers, now has or which it may hereafter acquire, and mentioned and described in the contract, forms and schedules annexed and attached hereto, and marked Exhibit "A" and Exhibit "C", at prices less than those set opposite each of said products in said schedules as mentioned and described therein, or at prices less than those which may be shown in any future minimum retail prices schedules hereafter issued by plaintiff in connection with its contracts with other dealers; and from making any rebates, refunds, discounts or concessions of any kind or character for the purpose of or which will result in decreasing the said stipulated resale scheduled prices, except that in case defendants are (a) closing out their stock for the purpose of discontinuing delivering any such commodity, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court; and that upon final hearing, said injunction be made permanent and perpetual.

Plaintiff further prays for such other, further and different relief of any and every sort as to this Court may seem just, equitable and proper in the premises, together with costs and disbursements of this suit.

(S.) MONROE & LEMANN,

(S.) WALTER J. SUTHON,

(S.) ROBERT G. POLACK,

Solicitors for Plaintiff.

1424 Whitney Building,
New Orleans, Louisiana.

State of Louisiana,
Parish of Orleans.

Robert G. Polack, being duly sworn, deposes and says:

That he is an attorney at law and one of the solicitors for the plaintiff herein; that he has read the foregoing bill of complaint, and knows the contents thereof; that plaintiff is a foreign corporation and that none of its officers are within the State of Louisiana; that all of the allegations of fact contained in said bill of complaint are true and correct to the best of affiant's knowledge, information and belief; and that as to such matters as are stated on information and belief, affiant believes them to be true.

(S.) ROBERT G. POLACK.

Sworn to and subscribed before me at New Orleans, Louisiana, this 23rd day of November, 1949.

(S.) NICHOLAS CALLAN,
Notary Public.

EXHIBIT "A".

Seagram-Distillers Corporation.

This Agreement, made this day of, 194..., between Seagram-Distillers Corporation, a corporation with an office and place of business at 405 Lexington Avenue, New York City, N. Y. (hereinafter called "Distributor"), and, of, Louisiana (hereinafter called "Retailer"),

Witnesseth:

Whereas, Distributor is engaged in the business of distributing certain alcoholic beverages which are owned by Distributor and the labels or containers of which bear the

trade-marks, brands and/or name of Distributor, or the trade-marks, brands and/or name of the producer thereof, and

Whereas, in each case in which Distributor does not own any trade-mark, brand or name used in connection with any such beverage, Distributor has been specifically authorized by the producer owning such trade-mark, brand or name to establish a minimum resale price for such beverage pursuant to the provisions of the Fair Trade Act of the State of Louisiana, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced or distributed by others, and

Whereas, Distributor and Retailer desire to avail themselves and the public of the benefits of the said Fair Trade Act, and to avoid having such trade-mark and branded articles made the subject of injurious and uneconomic practices, and to avoid the depreciation of or damage to said trade-marks, brands or names through such practice,

Now Therefore, the parties hereto agree as follows:

First: Retailer will not sell, advertise, or offer for sale within the State of Louisiana any alcoholic beverage which Retailer has purchased, or now has on hand, or may hereafter purchase, and which (a) bears the trade-mark, brand or name of Distributor, or (b) is distributed by Distributor and bears the trade-mark, brand or name of the producer of such beverage, at less than the minimum price for such beverage stipulated from time to time by Distributor. Retailer further agrees that he will not offer or give any article of value in connection with the sale of such beverage.

age, or sell or offer for sale any such beverage in combination with any other commodity, or make any refunds, discounts or concessions of any kind, whether by the giving of coupons or otherwise, for the purpose of, or which will result in evading the minimum price restrictions imposed under this contract.

Second: In the event (a) of closing out of Retailer's stock for the purpose of discontinuing dealing in any alcoholic beverage to which this contract is applicable, or (b) that any such beverage in Retailer's hands is damaged, defaced, or deteriorated in quality, or (c) that Retailer has on hand any of said beverages after this agreement has been terminated or canceled for any reason, Retailer, before offering the beverage or beverages in question for sale at a price or prices less than the minimum prices fixed therefore pursuant to this contract, shall first give Distributor reasonable notice in writing and an opportunity to purchase such beverage or beverages at the original invoice price at which Retail purchased such beverage or beverages.

Third: The minimum prices of said beverages in sales by Retailer to consumers shall be in accordance with written schedules furnished from time to time by Distributor to Retailer, which schedules shall constitute a part of this contract. Distributor reserves the right at any time, and from time to time, by giving written notice to Retailer, to change the minimum prices specified in said schedules, to eliminate one or more beverages from the operation of this contract, and (subject to the provisions of the said Fair Trade Act) to extend the operation of this contract to one or more additional beverages. Said notice may be given by delivering the same to Retailer in person, or to any employee of Retailer at Retailer's principal place of business,

or by mailing the same by registered or ordinary mail addressed to Retailer at Retailer's place of business, and shall be effective upon the expiration of five (5) days after the delivery or mailing thereof, as the case may be, Sundays and holidays included. The schedule which shall have last become effective shall govern the minimum prices for said beverages at the time each particular sale, advertisement, or offer of sale is made.

Fourth: Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Distributor by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to Distributor, as liquidated damages, the sum of Fifty (\$50) Dollars for each breach of this contract. It is further agreed that Distributor, in addition to all other legal rights and remedies, shall be entitled to injunctive relief against any and all breaches of this agreement by Retailer.

Fifth: This contract shall expire in one year from the date hereof, but shall be renewed from year to year unless at each termination date the parties hereto indicate in writing their desire not to have the contract renewed. Distributor reserves the right to cancel this agreement on twenty-four hours written notice to Retailer, which may be given in the manner prescribed in paragraph "Third". Neither termination nor cancellation shall affect any right which shall have accrued to either of the parties hereto under this contract or the said Fair Trade Act prior to such termination or cancellation, or affect the application to Retailer of the provisions of the said Fair Trade Act relating to non-contracting parties.

This contract supersedes any previous contracts, based on the said Fair Trade Act of Louisiana between the parties hereto.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above written.

**SEAGRAM-DISTILLERS
CORPORATION,
Distributor.**

By

Retailer.

By

State of Louisiana,
Parish of Orleans.

Sidney E. Rudman, being duly sworn, deposes and says: That he resides in the City of New Orleans; that Seagram-Distillers Corporation did, on or about April 1st, 1948, enter into signed contracts with more than one hundred retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case and marked Exhibit "A", and providing for the maintenance of minimum retail price schedules; that Seagram-Distillers Corporation has, on or about November 10, 1949, sent telegrams to all retail liquor dealers operating in the State of Louisiana, a true and correct copy of which telegram is attached to the bill of complaint in this case and marked Exhibit "B"; that Seagram-Distillers Corporation has, on or about November 11, 1949, entered into signed contracts with six retail liquor dealers operating stores in the State of Louisiana on the printed form of retail fair trade sales agreement, a true and correct copy of which form is attached to the bill of complaint in this case and marked Exhibit "C", and providing for the maintenance of minimum retail price schedules; that he caused to be mailed

through the New York office of Seagram-Distillers Corporation and Gulf States Beverage Journal of Coral Gables, Florida, by United States mail, postage prepaid, on or about November 14, 1949, a copy of the notice of the minimum retail price schedules on products of Seagram-Distillers Corporation, identical with the form attached to the bill of complaint in this case, and marked Exhibit "A"; that a copy of said notice was addressed and mailed to Schwegmann Brothers Super Market at 2222 St. Claude Avenue, New Orleans, Louisiana; that when Seagram-Distillers Corporation caused to be mailed a copy of said Exhibit "A" to Schwegmann Brothers Super Market, it also caused copies thereof to be mailed simultaneously to all other retail liquor establishments in Louisiana.

(Sgd.) SIDNEY E. RUDMAN.

Sworn to and subscribed before me at New Orleans, Louisiana, this 21st day of November, 1949.

(Sgd.) ROBERT G. POLACK,
Notary Public.

ANSWER TO COMPLAINT.

Filed Dec. 12, 1949.

(Number & Title Omitted.)

To the Honorable the United States District Court for the Eastern District of Louisiana, New Orleans Division:

First Defense.

The complaint fails to state a claim upon which relief can be granted, because the plaintiff's attempt to use con-

tracts with certain Louisiana retailers as a basis for fixing the prices of non-contracting Louisiana retailers violates the Sherman Anti-Trust Act, as amended by the Miller-Tydings Act, insofar as sales affecting interstate commerce are concerned. The sales which form the basis of the complaint are an integral part of a general pattern of transactions affecting interstate commerce.

Second Defense.

The complaint fails to state a claim upon which relief can be granted, for the following reasons:

(1) The contracts executed on or about April 1, 1948 expired one year from the date of execution. Such contracts could not be renewed under the renewal clause, because of Regulation 8 of the Louisiana Board of Alcoholic Beverage Control. Regulation 8 (effective November 9, 1948; rescinded, effective November 12, 1949) prohibits the execution of fair trade contracts "affecting the prices of liquor in the State of Louisiana". A copy of Regulation 8 and a copy of the Board's order rescinding the regulation are attached hereto, as Defendants' Exhibits "A" and "B".

(2) The contracts referred to as having been executed "on or about November 11, 1949", which were the subject of plaintiff's notice to non-contracting dealers dated "New York City, November 14, 1949", were executed on or before November 11, 1949. The contracts are null and void, because they were in violation of Regulation 8 of the Louisiana Board of Alcoholic Beverage Control, Defendants' Exhibit "A".

Third Defense.

The complainant fails to state a claim upon which relief can be granted, for the following reasons:

(1) Implicit in Act 13 of 1936 is the mandate that a producer, distributor, or wholesaler availing itself of this extraordinary statute must maintain a uniform price policy. Plaintiff has not maintained a uniform price policy. In the enforcement of its prices, plaintiff winks at price-cutting of certain dealers, especially those who cooperated with plaintiff in sponsoring and defending the price-fixing features of Act 360 of 1948. Plaintiff discriminates against other dealers, and particularly against defendants who attacked the price-fixing features of Act 360 of 1948.

(2) Plaintiff comes into Court, seeking equitable relief, with unclean hands in that it has enforced its resale prices in an arbitrary and discriminatory manner.

Fourth Defense.

The complaint fails to state a claim upon which relief can be granted. The acknowledged basis for holding non-contracting parties to prices fixed in a so-called fair trade contract is to protect the good will incident to ownership of a trade-mark. The contracts upon which plaintiff relies in this action were not entered into by the producer or by the owner of the trade-mark in question, but by a distributor, a separate corporate entity having no ownership of the trade-mark. The contracts relied upon here do not, therefore, come within the contemplated scope of Act 13 of 1936 or of the Miller-Tydings Amendment to the Sherman Anti-Trust Act.

I.

Defendants, for lack of information, deny the allegations in Paragraph I of the complaint and call for strict proof, including proof of the fact that complainant is qualified to do business in the State of Louisiana.

II.

Defendants admit the allegation in Paragraph II of the complaint, but deny that the acts complained of are in violation of existing law.

III.

Defendants deny that this Court has jurisdiction based on diversity of citizenship. On the contrary, defendants aver that indispensable party plaintiffs in this suit are Louisiana citizens. The validity of the contracts relied upon here is at issue; all the contracting parties are therefore indispensable parties.

IV.

Defendants deny the allegations of Paragraph IV of the complaint, for lack of information, except that they admit that all of the products mentioned therein that are purchased from plaintiff for resale in Louisiana are purchased from and sold by plaintiff in interstate commerce.

V.

Defendants deny, for lack of information, the allegations in Paragraph V of the complaint and call for strict proof of the fact that the products and commodities therein

mentioned are in fair and open competition with products and commodities of the same general class produced by others.

VI.

The allegations of Paragraph VI require no admission or denial by defendants.

VII.

Defendants deny the allegations in Paragraph VII of the complaint, especially insofar as Louisiana is concerned.

VIII.

Defendants deny the allegations in Paragraph VIII of the complaint, insofar as Louisiana is concerned, except they admit that the laws referred to were enacted.

IX.

Defendants deny the allegations in Paragraph IX that the Louisiana Fair Trade Law was enacted to protect the consuming public against injurious and uneconomic practices. On the contrary, defendants avers that the so-called Fair Trade Law was pressured through the legislature by a few well-organized pressure groups of wholesalers and retailers for their own advantage; solely for the profit of inefficient and marginal merchants who could not survive in a competitive market, to the detriment of the public and of the efficient merchant who could prosper in a free and competitive market.

Defendants deny the validity of the contracts mentioned in Paragraph IX of the complaint. Defendants admit the receipt of the letter from plaintiff's New York office, dated November 14.

X.

Defendants deny the allegations of Paragraph X of the complaint, and particularly that they violated any existing law.

XI.

Defendants deny the allegations of Paragraph XI except with respect to the product known as Seagram's Seven Crown, which it admits it sold at the prices set forth in subparagraphs 1, 2, 3, and 4 of Paragraph IX of the complaint.

XII.

Defendants deny the statement made in Paragraph XII, particularly that defendants' acts have induced and forced other retail liquor dealers under contract with plaintiff to violate their contracts with plaintiff.

Defendants deny that the buying public is misled by virtue of reduced prices and allege on the contrary that such reduced prices benefit the public. Defendants deny that retailers cannot profitably market plaintiff's commodities except at the price fixed by plaintiff. Defendants deny that the sale of plaintiff's product at a price below the established price will cause a destruction of plaintiff's business, and defendants deny that plaintiff is entitled to injunctive relief.

Wherefore, defendants prays that the complaint herein be dismissed at plaintiff's cost.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,

Attorneys for Defendants.

By SAUL STONE.

312 Whitney Building,
New Orleans, Louisiana.

MOTION TO DISMISS.

Filed Dec. 13, 1949.

(Number & Title Omitted.)

To the Honorable The United States District Court for the
Eastern District of Louisiana, New Orleans Division:

The defendant moves the Court to dismiss the complaint for the following reasons:

1. The complaint fails to state a claim against defendant upon which relief can be granted. The contracts relied upon by plaintiff are null and void under the law of Louisiana in that the contracts lack mutuality for the reason that the plaintiff has incurred no obligation thereunder. In the alternative, if an obligation on the part of the plaintiff inferentially exists, such obligation is subject to purely potestative conditions.

2. Plaintiff has failed to join indispensable parties. Plaintiff predicates its complaint on contracts, the validity of which are at issue. The contracting dealers are therefore indispensable parties to the action.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendants,
By J. M. WISDOM.

312 Whitney Building,
New Orleans, Louisiana.

STIPULATION.

Filed: December 14, 1949.

(Number & Title Omitted.)

It Is Agreed between counsel that the testimony of the following witnesses, including any exhibits referred to and offered in evidence in connection therewith, as given in the case of Calvert Distillers Corporation V. Schwegmann Brothers et al., Civil Action No. 2607 of the docket of this Court, shall apply also to the case of Seagram-Distillers Corporation v. Schwegmann Brothers et al., Civil Action No. 2608 of the docket of this Court, to the full extent that it is relevant and material to the latter case, with Seagram-Distillers Corporation to have the benefit of all objections interposed by counsel on behalf of Calvert

Distillers Corporation during the taking of that testimony:

1. Thomas H. Schneideau.
2. Frederick W. Scharfenstein.
3. Marvin Levin.

It Is Further Agreed that if Frederick W. Scharfenstein were examined as a witness in the case of Seagram-Distillers Corporation v. Schwegmann Brothers et al., he would give substantially the same specific testimony as to Seagram products and price lists as he gave as to Calvert products and price lists in his testimony, and, for the purpose of the application of his testimony to the Seagram case, his testimony should be construed as enlarged to that extent by this agreement.

It Is Further Agreed that the testimony of the following witnesses, including any exhibits referred to and offered in evidence in connection therewith given in the Calvert case shall be considered in the Seagram case only insofar as their testimony, if presented at the trial of the Seagram case, would be admissible and received in evidence against objections of irrelevancy and immateriality in the Seagram case:

1. Anthony Bologna.
2. Harold Bevan.
3. John Schwegmann, Jr.

It Is Further Agreed that the testimony of Henry W. McGuire, including any exhibits referred to and offered in evidence in connection therewith, given in the Calvert case shall be considered in the Seagram case only insofar as his testimony, if presented in the trial of the Seagram case, would be admissible and received in evidence against objections of irrelevancy and immateriality in the Seagram case, but counsel for plaintiff in the Seagram case contend that not part of his testimony in the Calvert case is relevant or material to the Seagram case, and make this stipulation with reservation of all of their said objections of irrelevancy and immateriality in the Seagram case to all of his testimony in the Calvert case.

It Is Further Agreed that attached fair trade contracts were entered into by Seagram-Distillers Corporation on November 10, 1949, with

1. Brass Rail.
2. L & A Wine Cellar.
3. Broadway Liquor Store.
4. Jackson Bar.

and that attached fair trade contracts were entered into by Seagram-Distillers Corporation on November 11, 1949, with

5. Cuban Liquor Co., Inc.
6. -A. B. C. Liquor Company.

It Is Further Stipulated that on March 22, 1948, the attached contract was entered into between Seagram-Distillers Corporation and Frederick W. Scharfenstein, doing business as Continent Wine & Liquor Co., and contracts in similar form were entered into on various dates between that date and June 22, 1948, by Seagram Distillers Corporation with various other retail liquor dealers. Name and dates of contracts will be shown on list to be furnished and filed.

It Is Further Stipulated that the B & W Package Liquor Store, Canal at Broad Streets, New Orleans, Louisiana, advertised in the Times-Picayune on Thursday, November 10, 1949, Seagram's 7 Crown whiskey at \$3.64 a fifth-gallon, and that Katz and Bes-thoff, New Orleans, Louisiana, advertised Seagram's 7 Crown whiskey in the Times-Picayune on Friday, November 11, 1949, at \$3.51 a fifth-gallon, as shown by the attached copies of the newspaper pages containing these ads.

December 14, 1949.

(S.) MONROE & LEMANN,
 (S.) ROBERT G. POLACK,
 (S.) WALTER J. SUTHON, JR.,
 Attorneys for Plaintiff.
 (S.) WISDOM & STONE,
 (S.) JOHN MINOR WISDOM,
 (S.) SAUL STONE,
 Attorneys for Defendants.

(Number & Title Omitted.)

Proceedings Had in open Court before Honorable J. Skelly Wright, Judge, United States District Court

for the Eastern District of Louisiana, in the above entitled and numbered cause, on December 14, 1949, at New Orleans, Louisiana.

Appearances:

Messrs Wisdom & Stone, (John Minor Wisdom, Saul Stone, Esqs.), Attorneys for Defendants.

Messrs Monroe & Lemann, (Walter J. Suthon, Jr., esq.), Robert G. Polack, Esq., Attorneys for Plaintiff.

Mr. Stone:

We met this morning, as Your Honor suggested yesterday and we all agreed to try and consolidate this matter and agree upon as much testimony as we could that would be applicable in both the Calvert and Seagram cases against Schwegmann Brothers. We went over the testimony of some six witnesses and we agreed to cetrain limits as to the extent of the materiality of the testimony given by those witnesses that would be applicable in the Seagram case. We have dictated it to a stenographer and it has been typewritten. We do have several witnesses upon whom we cannot agree, so we thought the most expeditious way to handle it would be to present those witnesses to Your Honor.

The Court:

Proceed.

Offer: Mr. Suthon:

On behalf of the plaintiff in this case, we offer in evidence the exhibits attached to the complaint, the

affidavits and stipulation, and the same note of evidence we presented in the other case.

Mr. Stone:

We might point out to Your Honor we also agree that the exhibits filed on the Calvert case apply in so far as they pertain to the Seagram case, also the exhibits attached to the stipulation to have the same effect as if they were offered in evidence before Your Honor; the newspaper clippings pertaining to Seagram during that particular period.

Now we have the motion that we presented. We are filing the same motion and our Answer as well, in this case. I don't know whether it is in the record as yet, but we do have it.

The Court:

That has not been filed.

Mr. Stone:

We have the motion to dismiss the Seagram case. We also have the Answer. The Answer is substantially the same with very slight variations. We are not raising in the Seagram case the question of defense predicated upon the previous motions.

Mr. Suthon:

I have stipulated it, and it has been dictated and transmitted as far as possible, making the testimony in the Calvert case apply in so far as material in the Schwegmann Brothers case. Counsel has not had chance to read it. I will read it to the Court.

The Court:

Suppose you read it.

Mr. Suthon:

(Counsel reading stipulation to the Court). I find this stipulation is in order and I am willing to file it.

Mr. Stone:

I think it is exactly as we agreed on when in conference this morning.

Mr. Suthon:

We dictated it together and it came out exactly as I thought it would.

Mr. Stone:

I will sign it.

The Court:

Let the Motion to dismiss be taken under advisement along with the other Motions. Let the stipulation be filed.

Mr. Suthon:

The seven contracts, exhibits attached to the stipulation just presented and filed and offered in evidence by the plaintiff, are marked respectively exhibits Seagram-1 to Seagram-7, both inclusive.

The Court:

I take it the plaintiff rests.

Mr. Suthon:

Plaintiff rests, Your Honor.

TESTIMONY ON BEHALF OF DEFENDANTS.

SIDNEY E. RUDMAN: Witness, being duly sworn on behalf of defendants, was examined and testified as follows:

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Sidney E. Rudman.

Q. What is your occupation, Mr. Rudman?

A. District Sales Supervisor for Seagram Distillers Corporation.

Q. Where is your office located?

A. 440 Canal Building.

Q. As the District Sales Supervisor for Seagram Distillers Corporation, what exactly is your function in the State of Louisiana for Seagram Distillers Corporation?

A. Well, I supervise the sales of our products through our wholesale houses and supervise the activities in our State.

Q. Do you have any other States under your jurisdiction?

A. Arkansas and Tennessee.

Q. Do you have a State Manager in the city of New Orleans for the State of Louisiana?

A. We have.

Q. What is his name?

A. Howard C. Upton.

Q. He is presently ill?

A. He has been for some months.

Q. And you are filling in, doing his work for the State of Louisiana?

A. That's right.

Q. How long have you been with Seagram Distillers Corporation?

A. Six years.

Q. How long have you been acting as manager for the State of Louisiana?

A. Approximately six months.

Q. Were you in the State of Louisiana when—did you have anything at all to do with the Seagram Distillers Corporation operations in Louisiana before Act No. 360 went into effect?

A. Yes, in the Northern part of the State.

Q. You were then working for Seagram Distillers Corporation in New Orleans?

A. I was working out of New Orleans.

Q. Where is Seagram Distillers Corporation domiciled. Do you know that?

A. Our main office?

Q. Yes.

A. New York City.

Q. You are employed by the main office in New York City to operate and function in Louisiana?

A. That's right.

Q. Would you explain to the Court the procedure that Seagram Distillers Corporation goes through when it effects the sale of its merchandise to a Louisiana purchaser?

A. By purchaser you mean retailer?

Q. Whichever you sell to?

A. Seagram Distillers Corporation sells direct to our wholesalers.

Q. That is a purchaser?

A. In New Orleans market our wholesaler is the Magnolia Liquor Company. We solicit our orders from Magnolia and place those orders with the New York office and arrange for shipment from our plant.

Q. Your plant then ships the merchandise direct to Magnolia Liquor Company?

A. That's correct.

Q. How many wholesalers do you have in the State of Louisiana?

A. Four.

Q. Who are they?

A. Magnolia Liquor Company, New Orleans; Magnolia Liquor Company, Lafayette, Louisiana, Blue Grass Liquor Company, Shreveport, Louisiana and Blue Grass Liquor Company in Monroe, Louisiana.

Q. There are no other authorized wholesalers of Seagram products in New Orleans?

A. Not for direct shipment.

Q. Any other dealers to get shipments, they would have to get it through some other source than Seagram Distillers Corporation?

A. That's correct.

Q. Does Seagram Distillers Corporation maintain or have any salesmen in the State of Louisiana, particularly in New Orleans, who call on the retail trade in New Orleans?

A. Some distillers call their men salesmen. We call our men sales promoters or regional representatives.

Q. Will you explain to the Court exactly what those regional representatives do when they call on the trade in New Orleans?

A. The function of our representatives are more or less for advertising purposes and sales promotion only. They will contact the retailer and ask them to

have a window display of Seagram, arrange for a better position of our merchandise on their counters and in their stores.

Q. Do any of your regional representatives ever go out with salesmen for Magnolia Liquor Company when the salesmen for Magnolia Liquor Company are soliciting business for Magnolia on Seagram products?

A. Yes, they do.

Q. They frequently do that?

A. Yes, Sir.

Q. And they try, as I understand it, and as you indicated earlier today, they try to encourage the sales from the wholesalers to the retailers of Seagram products?

A. That's right. And from the retailers to the consumer.

Q. Now you, on behalf of Seagram Distillers, entered into these six contracts with Louisiana or New Orleans retailers that are dated November Tenth and Eleventh, which were offered in evidence by your attorney?

A. That's right.

Q. In each instance you represented the Seagram Distillers?

A. That's right.

Q. The dates that appear on those contracts are November Tenth and Eleventh. Are those the actual dates that the contracts were entered into?

A. November Tenth was a Wednesday—yes, those are the exact dates.

Q. Did you go out with those contracts to those retailers and have them sign the contracts in your presence?

A. No, Sir, I did not.

Q. So you don't know what date those retailers may have signed the contracts?

A. I know those contracts were signed on that date, because our New Orleans manager for Seagram Distillers had them signed with the exception of one in Shreveport, and that is my signature on them.

Q. So those contracts must have been signed on or before November Eleventh by both parties?

A. They were signed on that date.

Q. Does Seagram Distillers maintain the same resale prices at retail level on those products, making allowance for local freight and freight rates throughout the United States?

A. To the best of my knowledge, absolutely.

Q. Do you, or does anyone in the Louisiana office have anything at all to say with respect to the fixing of the prices in Louisiana on those products?

A. I have to work out price formulae on our products in Louisiana, based on the formula of fifteen percent profit to the wholesaler, exclusive of Federal tax and $33\frac{1}{3}$ percent, exclusive of Federal tax, to the retailer.

Q. You say you work out that formula after arriving at a price. What did you have to do with fixing the base price that that formula was predicated on?

A. Our base price has been the same for many, many years as long as I have been with Seagram.

Q. The base price on each product has been the same?

A. That's correct.

Q. You never changed the content of the product?

A. Never changed in ten years.

Q. You never changed when your product was known as Seagram 7 Crown, with a larger content of old whiskeys or a lower content of old whiskeys?

A. That has nothing to do with the blends.

Q. But you never changed the contents of your products?

A. No, Sir.

Q. When you say that you had something to do with the fixing of this formula that you suggested, how would you go about in establishing prices with that formula? Would you tell the Seagram Distillers in New York, by whom you were employed, that that would be the price, or merely suggested it, or what?

A. No. We work on what the best trade price is and based on the formula, submit prices to our New York office, and they okay them and then send us the official price list.

Q. New York actually fixes the price?

A. They confirm it.

Q. They actually fix the price?

A. Yes, Sir.

Q. Did you enter into any Seagram Distillers contracts in New Orleans without being authorized by New York to do so?

A. Certainly not.

Q. Where are most of the Seagram whiskeys handled with Seagram Distillers in Louisiana?

A. Lawrenceburg, Indiana.

Q. I believe I understood you to say you would send an order to New York when you got it and the New York office would ship it to Magnolia, or your wholesaler in Louisiana?

A. Yes, Sir.

Q. From what point do they ship the whiskeys?

A. Lawrenceburg, Indiana.

Q. Does Seagram Distillers handle any stocks of whiskeys at all in the State of Louisiana?

A. No, Sir.

By Mr. Wisdom:

Q. Did I understand you to say you had a New Orleans manager?

A. Yes, Sir.

Q. And you are his boss?

A. That's right.

Q. Do I understand you to say that you are then in control of Louisiana, Arkansas and Tennessee, they are within your jurisdiction?

A. Yes, Sir.

Q. To whom do you report?

A. Harry C. Fischel.

Q. What is his capacity with the company?

A. Southern Division Manager.

Q. He is the Southern Division Manager for Seagram Distillers?

A. That's correct.

Q. Can you tell me what States are within his territory?

A. Florida, Georgia, South Carolina, Louisiana, Tennessee, Arkansas, Texas and Kansas.

Q. Can you tell me to whom he reports?

A. Yes, Sir. He has several bosses, Victor Fischel.

Q. Where is his office?

A. Chrysler Building, New York.

Q. And he is with Seagram Distributors head office in New York?

A. That's right.

Q. Can you tell me whether Seagram Distillers is a subsidiary of any other company, based on your own knowledge?

Mr. Suthon:

Who are you referring to by Seagram Distillers, you mean the plaintiff in this case, Seagram Distillers Corporation?

Mr. Wisdom:

So far we are talking about Seagram Distillers Corporation.

Q. Is that correct?

A. Yes, Sir.

Q. So far this is Seagram Distillers Corporation. Paragraph-4 of plaintiff's petition states that Seagram Distillers Corporation is a wholly owned subsidiary of Joseph E. Seagram & Sons, Inc. Can you tell me whether you know if Joseph E. Seagram & Sons is a subsidiary of any other corporation?

Objection: Mr. Suthon:

We object as not relevant or material to this case. We do allege in the complaint that Seagram Distillers Corporation is a subsidiary of Joseph E. Seagram & Sons, Inc., an Indiana corporation which owns Seagram Distillers Corporation, and authorized to make contracts, and I say this is not material or relevant to any pleading in the Answer.

Mr. Wisdom:

One of our defenses is the act of the plaintiff was in violation of the Anti-Trust Act. It is our contention that they have one operation directed through

the State of Louisiana, and we want to show it directed not only by the office of Seagram in New York—

Mr. Suthon:

It is alleged in the case there is no local manufacture, no local stock, that whenever anything is ordered here, the order goes to New York and it is filled by the department from Indiana to New Orleans.

The Court:

I sustain the objection.

By Mr. Wisdom:

Q. Can you tell me whether the contracts you issued in Arkansas and Tennessee are identical, or substantially similar to the contracts issued in Louisiana?

Objection: Mr. Suthon:

We object as not relevant or material to any issue in this case. We are trying here the fair trade prices of Louisiana, Tennessee and Arkansas.

Mr. Wisdom:

We want to show that it is nationwide. For example, in the Franklin Distillers case it was pointed out they had one type of contract throughout the country. Franklin Distillers is a subsidiary of Joseph E. Seagram & Sons, Inc. just as Seagram Distillers Corporation.

The Court:

Suppose you ask the question whether or not this same contract was used in other States by Seagram.

I would make no objection to that question.

Mr. Wisdom:

I intended to ask that question.

Q. Mr. Rudman, is the same contract issued by Seagram in other States?

A. I believe so. I am not definitely certain whether any changes in that clause.

Q. You are familiar with the contract issued in Tennessee?

A. Yes, Sir.

Q. Are they the same?

A. Seems that way to me.

• • • • •

MANFRED WILLMER: Witness, being duly sworn on behalf of defendants was examined and testified as follows.

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Manfred Willmer.

Q. You are employed by the Magnolia Liquor Company?

A. Yes, Sir.

Q. In what capacity are you employed?

A. Sales Manager.

Q. How long have you been with the Magnolia Liquor Company?

A. I have been with the Magnolia Liquor Company since 1947, but I have been Sales Manager for approximately six weeks.

Q. You were with the Magnolia Liquor Company then during the four months preceding the effective date of the Louisiana Mandatory Liquor Law in July, 1948?

A. Yes, Sir.

Q. At that time what were you doing for Magnolia Liquor Company?

A. At that time I was acting more or less as a sales supervisor.

Q. You are familiar with the situation that prevailed in the city of New Orleans with respect to the sales of whiskeys during that period immediately preceding July 27 or 28, 1948, are you not?

A. Yes, Sir.

Q. Do you know whether or not Seagram products were being sold generally throughout the city of New Orleans and this area for less than the fair traded price in effect at that time?

A. I am not certain as to what the fair trade prices were in effect at that time and at what time those fair trade prices went into effect. I do know that Seagram was sold for less at that time.

Q. How do you know that?

A. I saw the Newspaper advertisements and saw the prices.

Q. You were familiar with Seagram prices that had been maintained by the Seagram Distillers Corporation?

A. I do know some contracts that were entered into somewhere along that time, but as to the exact dates those contracts were entered into I don't know.

Q. Do you recall about when those ads appeared that you saw in the Newspapers you just referred to?

A. Prior to the passage of Act 360; more or less ads appearing in the Newspapers in some degree of regularity.

Q. Would that be three months prior to Act 360?

A. Yes. I don't think anybody would deny it.

• • • • • • •

By Mr. Stone:

Q. When you were acting as sales supervisor during that period in 1948, did you ever go out with any Seagram representatives to call on the trade?

A. I am sure I must have, yes.

Q. Was it a common practice for a Seagram representative to accompany a Magnolia representative when calling on the retail trade?

A. Yes, Sir.

Q. You are familiar with what is meant by the term "Deal" in the liquor industry in this area, are you not?

A. I have my own understanding of it.

• • • • • • •

Q. Will you explain to the Court what a deal is?

A. My own understanding of a deal is some sort of transaction that guys go in and bargain with the retailer. He may not know exactly what he is going to offer the retailer and the retailer may not know the exact terms he is going to apply. A deal is arrived at by two persons or more.

Q. Is that what is understood by a deal in this area?

A. To the best of my knowledge that is the way I regard it, as such.

Q. Would you regard a transaction a deal if a representative of a wholesaler went to a retailer and

out bargained him over a discount of \$2.50 a case for 25 cases?

A. I consider that a quantity deal.

Q. That is not a deal?

A. No, Sir.

Q. It hasn't been looked upon as a deal?

A. I can't answer what other people think.

Q. Do you know any quantity discounts Seagram gave during that period preceding July, 1948?

A. To the best of my knowledge Seagram has never participated in any deals prior to that time or since that time.

Q. How about Magnolia?

A. Prior to Act 360 Magnolia had discounts on quantity.

Q. When Magnolia gave a quantity discount, do you know whether or not it was given—that was before Act 360—

A. Yes, Sir.

Q. —with any idea that the retailer in turn would correspondingly lower the price at the consumer's level?

Objection: Mr. Suthon:

We object as a conclusion.

The Court:

I think Counsel has the right to bring out what this witness' purpose was in giving the quantity discounts. If you can phrase your question so as to bring that out, it will be admissible.

By Mr. Stone:

Q. Do you know whether or not, when quantity discounts were given to retailers, it was done in order to permit the retailer to correspondingly reduce the prices at the consumer's level of that product?

A. That was never our purpose.

Q. What was your purpose?

A. Our purpose was to sell more merchandise.

Q. Was that purpose restricted to the fact that you wanted the retailer to make more money?

A. No, Sir. The purpose in offering quantity discounts is (a), to sell more merchandise, and (b), based on the fact that the quantity purchase is cheaper. It is cheaper to serve quantity purchases, therefore, in the trade generally he is entitled to some consideration.

Q. Don't you know, as a matter of fact, that most of the retailers who made quantity savings, passed those savings on to the customer?

A. I know many retailers in quantity discounts reduced prices.

Q. Isn't that the same?

A. No. When I went in the liquor business I found that prices had already been cut. So far as I could see, the merchandise I sold or participated in selling, had absolutely no effect in either raising or lowering prices. Prices were already gone. When I went into the liquor business prices had already been reduced.

Q. By reduced, you mean less than the fair trade prices?

A. Less than the OPA prices.

Q. That was true with reference to Seagram products as well as the others you testified to?

A. Yes, Sir.

Q. And you went into the liquor business in 1947?

A. Yes, Sir.

Q. What month was that?

A. July, 1947.

Q. Did you as sales supervisor of Magnolia have anything to do with the fixing of prices at the retail level on Seagram products?

A. I don't quite understand that question.

Q. Seagram 7 Crown is now selling at the fair trade price of \$4.24. Is that correct?

A. Yes, Sir.

Q. Did you have anything to do as sales supervisor of Magnolia in this area, did you have anything to do with fixing the price at \$4.24, at the retail level?

A. No, Sir.

Q. Do you know whether or not Magnolia had anything to do with the fixing?

A. No, Sir.

Q. Do you know who fixed that price?

A. I suppose Seagram did. I don't know.

Q. All you do is carry out that price?

A. I don't know what you mean by carrying out.

Q. Do you have any conversation with your retailers as to prices they sell Seagram for?

A. Are you talking about now?

Q. Now, Yes.

A. Yes, definitely.

Q. And that price they give you of \$4.24 is the price they tell you that you have to sell it for?

• • • • •

MALCOLM WOLDENBERG: Witness, being duly sworn on behalf of defendants was examined and testified as follows.

Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. Malcolm Woldenberg.

Q. You are connected with the Magnolia Liquor Company in New Orleans?

A. Yes, Sir.

Q. In what capacity?

A. Vice-President.

Q. You are one of the stockholders as well, in that corporation?

A. Yes, Sir.

Q. You are also connected with the Magnolia Liquor Company in Lafayette, Louisiana?

A. Yes, Sir.

Q. Is this the same Magnolia Liquor Company that has the exclusive distribution for Seagram in this area?

A. Yes, Sir.

Q. From whom does Magnolia Liquor Company purchase their Seagram products that it distributes in this area?

A. The Seagram Distillers Corporation.

Q. Do you have the exclusive right to sell Seagram products in this area, or do you share that with anyone else?

A. We have the exclusive right at wholesale level.

Q. You know that this suit has been brought against Schwegmann Brothers for a violation of the

fair trade contract and that the suit is being defended, do you not?

A. I do.

Q. Now did you have anything to do with the prices that have been established on the resale of Seagram products in this area?

A. No, Sir.

Q. Do you take instructions entirely from Seagram Distillers with respect to the advice that you are to give the retail trade as to what prices the Seagram products are to be sold for at retail level?

A. Seagram sets the price at which the merchandise is to be sold at retail level. We are given those prices by Seagram Company. Under the Fair Trade Act those prices have been established and put out by Seagram with request that the merchandise be sold at those prices, and we tell them to sell at those prices.

Q. You are not charged with the enforcement of prices?

A. No, Sir.

Q. Are you familiar with the general situation that existed in Louisiana during the 3 or 4 months preceding the mandatory effective date of Act 360?

A. Not so well, 2 or 3 months previous to the act anyway—I don't remember the number of it, I spent very little time in New Orleans.

Q. Weren't you spending your time with Magnolia?

A. No, up in Wisconsin.

Q. You were familiar with what was going on?

A. I knew what was going on with respect to the mandatory State act.

Q. Do you know whether or not Seagram products were being sold at retail level for less price in New Orleans before Act No. 360 became effective?

A. Yes. I know they were not being sold for \$4.24.

Q. You know they were sold at less than that during that period?

A. Yes, Sir.

Q. You didn't have anything to do with enforcing the \$4.24 price at that time, did you?

A. I wasn't here very much.

Q. When I say you, I mean the Magnolia Liquor Company?

A. I don't believe very much was done by Magnolia in that respect.

Q. You are familiar with what is commonly called a deal in the whiskey trade in this area, are you not?

A. I am.

Q. Prior to July 27 or 28, 1948 when Act 360 became effective, did Seagram company give any deals to its retailers in this area?

A. No, Sir.

Q. Did Magnolia give any deals to retailers in this area?

A. Yes, Sir.

Q. Do you know whether or not the retailers in this area to whom Magnolia gave discounts on Seagram products, passed those discounts on to the consumer, or retained that additional profit for themselves?

A. I know that some of them passed—I know some of them sold at lower prices than the suggested retail price and some of them did not.

Q. Nothing was done to any of those who sold at a lower price?

A. Not that I know of.

Q. When you say suggested prices, you mean the fair trade prices?

A. Yes, fair trade prices.

Mr. Stone:

I have no further questions.

Cross Examination.

By Mr. Suthon:

Q. You were asked something about a deal, as that term was used, in the liquor trade?

A. Yes, Sir.

Q. What was your understanding as to that word "deal" that you were asked about?

A. I suppose it means a price lesser than our regular retail prices to the consumer. I believe the price for Seagram 7 Crown, the retailer's price is \$39.75 a case.

Q. Price from who to who?

A. Retail cost from us. That is our regular mark-up. We sold at \$39.75 or \$39.76 a case. I presume what was meant by a deal, we gave a discount off of that price for quantity purchases, on 25 case lots give a discount of \$5.00 a case prior to the Mandatory Fair Trade Act in Louisiana.

Q. In what year was that?

A. 1948, I believe, before the act went into effect. I think the act went in effect in September or August.

Mr. Stone:

July.

A. (Witness continuing). Before that time we had a discount of \$2.00 a case to retailers in 25 case purchases.

By Mr. Suthon:

Q. Was that discount available to any retailer who wanted to buy your product?

A. Yes, it was available to any retailer who wanted to buy our product. It was offered to the trade generally. All of our salesmen had that price to offer to the trade.

Q. Is that what you referred to as a deal in testifying as to the word "deal"?

A. That is what I understood.

Q. Did Seagram Distillers Corporation bear any part of that discount in deals between Magnolia and its retail customers?

A. No, Sir. Seagram Distillers Corporation never had a discount on their merchandise since we have been in business, or handling their line.

Q. How long has that been?

A. May, 1944 when we entered bussines. They have never given us a discount, nor have they in any way contributed to any rebates or discounts in depletion, so to speak, of merchandise in the warehouses.

Q. All these discounts you gave since 1944 that you testified to, Magnolia carried on its own?

A. Every discount we gave came from our profits.

Mr. Suthon:

That is all.

Mr. Stone:

That is all.

(Five minute recess).

JOHN SCHWEGMANN, JR., Witness being duly sworn on behalf of himself, was examined and testified as follows:

-Direct Examination.

By Mr. Stone:

Q. Please state your name?

A. John Schwegmann, Jr.

Q. You are one of the defendants in this proceeding brought by Seagram Distillers Corporation for an injunction against the partnership known as Schwegmann Brothers?

A. That is correct.

Q. Mr. Schwegmann, you are charged with having sold Seagram 7 Crown on November 21, 1949 for \$3.62 including the sales tax. You made that sale at your place of business?

A. No doubt I made the sale.

Q. You sold Seagram 7 Crown at that time for less than the fair trade price?

A. Yes, Sir.

Q. Did you buy that Seagram 7 Crown that you sold at a deal that has been referred to, as defined in this case.

A. No, Sir, I didn't get any deal from Seagram or from Magnolia.

• • • • •

Q. Now Mr. Schwegmann, before Act 360 went into effect in July, 1948 you purchased Seagram whiskeys on deals, did you not?

A. Yes, Sir.

Q. Now when you would purchase Seagram products on deals in that period, would you pass those

savings on to your consumers, or would you continue to sell Seagram products at the same price?

Objection: Mr. Suthon:

I object as not relevant or material.

The Court:

Counsel is trying to establish some connection between deals and fair trade prices. Objection overruled.

A. In that case where we got merchandise free or on discount, whichever way you want to put it, it amounts to the same thing because it was something other than the price, I took that merchandise and passed it on to the customers. If I bought 110 cases and I got a discount of \$10.00 or more, I would divide that and make it a little cheaper to our consumers.

* * * * *

Q. Do you know what the retail price was that generally prevailed in New Orleans on Seagram 7 Crown immediately preceding the effective date of Act 360?

A. It was probably the price—I don't remember exactly—at which I had been selling in this particular case, or lower. Immediately before, all liquor men urged us to buy plenty of liquor because of the new law taking place, because it was your last chance. That was more or less the tactics they used on me.

Objection: Mr. Suthon:

I object to the testimony as to all distillers.

The Witness:

Well, Seagram.

By Mr. Stone:

Were you told by a Seagram representative or Magnolia?

A. Yes, Sir. I take that back. In many cases both of them were there.

Q. Were you frequently called on by representatives of Seagram Distillers Corporation during that period?

A. I don't know how frequent. Occasionally they came in. At times they came in with representatives.

Q. Do you know whether, when any of them came in, you were offered deals?

A. Yes, in many cases they were in when deals were offered.

Q. At that time did they warn you about selling Seagram products for less than the fair trade price?

A. To the contrary, I warned them. I told them it would be impossible to buy all this liquor in event this Act would be passed, what was the use for me to buy all this liquor. I actually took the reverse. In many instances I discouraged the buying of that liquor because of this new Act.

Q. Now since Tuesday a week ago when this case was continued, have you maintained prices on Seagram products?

A. You know my word. I told you about that agreement. Over the phone I asked you would this be effective immediately on Tuesday and you said you would ring me back, and you rang me back and told me

Tuesday, so we started last Tuesday, not yesterday but the Tuesday before.

Q. And you are still maintaining fair trade prices on it?

A. Yes, sir.

Cross Examination.

By Mr. Suthon:

Q. What do you mean by a deal, you were talking about buying liquor at deals?

A. I am going to answer that question like this. I have had all kinds of deals. I had them where they sent merchandise without a bill and I had to mark it on a piece of paper, because the Alcohol Tax Unit instructed me when I first went in the business, if they gave you liquor and they didn't give it to you on a bill, you make your own bill and file it. If we have gotten a discount we mark it at the bottom where it says "Discount". I list the cases and we have to figure out the discount and apply that to exactly what we get it for. Sometimes we have more than one kind of product on the invoice, so we have to find out how this money came to us.

Q. That would be discount on quantity purchases?

A. I presume it would in that particular case.

Q. Is that the kind of deal you were talking about when you said you bought Seagram liquor before Act No. 360 became effective?

A. Yes, Sir, before Act 360.

Q. That is what I am talking about?

A. Yes, Sir.

Q. In the 3 or 4 months before the time when Act 360 went into effect in July, 1948 can you give us the name of any representative of Seagram, not some re-

presentative of Magnolia but a representative of Seagram who called on you and asked you to buy liquor—

A. No, Sir, I don't know them by name. I am bad on remembering names. He introduced Mister So and So and their names would be the things I wouldn't try to remember any more.

Q. The man that came in, you would know would be a Magnolia man?

A. Oh, Yes, I would know the Magnolia man.

Q. You can't give us the name of any Seagram men that called on you in this period before July, 1948 when this Act went into effect, who urged you to buy large quantities of liquors?

A. No, Sir, I don't know the names. I don't say they urged me what to sell it for. Nobody told me what to sell it for. I said this act is right around the corner, what will I do with it.

Mr. Suthon:

That is all.

* * * * *

Rebuttal Testimony.

MALCOLM WOLDENBERG, Witness being duly sworn on behalf, of plaintiff, was examined and testified as follows:

Direct Examination.

Q. Please state your name?

A. Malcolm Woldenberg.

Q. Mr. Woldenberg, there is offered in evidence a sheet from the Times-Picayune of Friday, November

11, 1949, marked as: "Stipulation Exhibit-6" which contains an advertisement by Katz & Besthoff showing a price of \$3.51 for a fifth of a gallon of Seagram 7 Crown. Did that advertisement come to your attention around the time it was advertised or shortly thereafter?

A. Yes, Sir.

Q. About how close would you say it was in point of days?

A. I would say four or five days.

Q. When that advertisement came to your attention did you have any contact with Katz & Besthoff on the subject, and if so, what?

A. When it came to our attention I went down to see Katz & Besthoff and saw Mr. Chapital and told him it was Seagram's policy to enforce fair trade prices wherever they could legally, and ask him how he felt about fair trade and he told me he was very much in favor of fair trade.

* * * * *

Q. Have you been back to see Mr. Chapital since that ad appeared in the Paper?

A. No, I have not.

By Mr. Suthon:

Q. Did you keep in touch with prices after your visit with Mr. Chapital with reference to Katz & Besthoff?

A. Yes, sir.

Q. What did you find after that visit as to the prices?

A. I found them selling it at \$4.24, the fair trade price, in one or two stores. I didn't check all of the stores.

Q. In checking the Katz & Besthoff prices on Seagram when you visited Mr. Chapital, was that price of \$4.24 the only price you found on that particular whiskey?

A. That is the only price I found them selling it at.

Q. Now in addition to your visit to Mr. Chapital, about which you testified, at Katz & Besthoff, did you make any visits to sellers at retail, making similiar ads of Seagram whiskey at that time?

A. Yes. I called on Mr. Schwegmann, I called on Solari and Walgreen Drug Store. I remember those definitely.

Q. And what did you inform those gentlemen when you called on them on the occasion of this liquor price advertisement?

A. I told them Seagram's policy was to maintain fair trade prices.

Q. Who did you talk to at Solari's?

A. At Solari's I talked to the clerk behind the counter.

Q. Was this Mr. Schwegmann here the man you talked to? (Indicating.)

A. Yes, this Mr. Schwegmann.

Q. What was your conversation with him?

A. My conversation with him was the same conversation, that Seagram policy was to maintain fair trade prices.

Q. What was his response to that?

A. His response was he had no quarrel with what Seagram wanted to do, but that he had been running his business for years and been successful and he intended to run his business the way he wanted to run it.

Q. Now after your visit to Walgreen's and Solari's on the occasion of these prices, did you not after that see the prices they were offering Seagram at?

A. Yes, Sir.

Q. This particular Seagram 7 Crown fifths?

A. Yes, Sir.

Q. What was it after you visit to Solari's?

A. \$4.24 a fifth.

Q. And at Walgreen's?

A. \$4.24.

Q. Did you call on any other stores besides those you mentioned around that time?

A. I called on B & W Liquor Store at Canal and Board.

Q. I show you in that connection an ad of the B. & W. Liquor Store, offered in evidence in this case, of the Times Picayune of November 10, 1949. "Defendants Stipulated Exhibit-1", showing an advertisement of Seagram 7 Crown, \$3.64 a pint. Was that the ad that occasioned your call?

A. Yes, this is the ad all right. It was the first one that appeared.

Q. What statement did you make, or who did you see at the B & W Liquor Store?

A. Emile Bruno, the owner.

Q. And what statement did you make to him as the reason for your call?

A. Same as I made the others, that Seagram maintained fair trade prices on their products and would like for them to do the same.

Q. After that visit did you take note of what B & W Liquor Store was offering Seagram 7 Crown fifths for?

A. No, I didn't get back in the store.

Mr. Suthon:

That is all.

Cross Examination.

By Mr. Stone:

Q. Didn't you say a short while ago when you were on the stand as a witness called by the defendants, that you were not charged with the enforcement of fair trade for Seagram?

A. Yes, I think I did.

Q. How did you happen to go out and do the policing for Seagram in this particular case that you referred to in your direct testimony?

A. Well, I didn't go out to do the policing. I want to see these customers to sell them merchandise. I went up to see Mr. Chapital to find out how they felt about fair trade.

Q. Didn't you say you saw ads in the Papers and you went out to see them and talk to them and said Seagram maintained fair trade prices on these products?

A. Will you say that again?

Q. I want to know why you went out to do the policing you referred to, after you stated you were not charged with the enforcement of that Statute and it was a function of Seagram to enforce fair trade prices and not Magnolia. I want to know why you went out to do the policing?

A. I didn't go out to do any policing. I went to Chapital four, five or six days after. My man and I were together. It is a routine call and I wanted to go over with him. We went into Katz & Besthoff and I talked to Chapital and talked about fair trade prices.

Q. You mean you went there, not because of that ad that he had run?

A. That's right. It was not because of the ad that I went there.

Q. How did you happen to go to B & W what you referred to?

A. I went to the B & W because we felt we were not getting enough business from them.

Q. And that ad that happened to run was a coincidence?

A. That ad was run a few days before. I don't call on the trade generally, personally I don't call on the trade.

Q. I understand you don't, you said you didn't. You are not charged with the enforcement of fair trade, that is the function of Seagram Distillers and that is why I am

asking you now why you had to do the policing those few days and I think I am entitled to an answer?

A. I am trying to answer your question. The B & W had this ad. I didn't go there because of the ad, maybe my subconscious mind.

Q. Was it purely a coincidence that you happened to go four or five days later when they were selling for less than the fair trade price?

A. No. Walgreen wasn't selling for less than the fair trade price.

Q. Was the reason you went to Schwegmann to sell him some merchandise?

A. Partly.

Q. Did you offer him some merchandise the day you called on him?

A. I don't recall that we did.

Q. Didn't you actually refuse to sell Schwegmann any merchandise that day that you called on him?

A. I don't know.

Q. You don't remember that?

A. I don't remember.

Q. I ask you whether or not the day you went to see Schwegmann that you say Schwegmann talked about running his business the way he wanted to, didn't you actually refuse to sell him Seagram goods that day?

A. I might have, I am not sure.

Q. You said you were not policing, it was not your job to enforce fair trade, that was the function of Seagram. You said you happened to go to places that advertised, Walgreen's that didn't, looking for business, you happened to go to Schwegmann's, you were not policing him, but you very likely refused to sell him.

A. When we went out that way we went to call on Mr. Papania.

Q. You went out there because of the ads showing the various low prices on Seagram. Did you go in there for the purpose of policing or not?

A. I would say yes, when we went in to see Mr. Papania.

Q. Then you did go in for the purpose of policing?

A. We were policing for orders. The price of \$3.09 was a cut price.

Q. Weren't you policing all of them?

A. No, I didn't go with that idea.

Q. Did you police Mr. Papania?

A. I went to talk to him about it.

Q. Did you go in to sell him, or to talk to him about the price of \$3.09?

A. We went in to talk to him about the price of \$3.09.

Q. Then you did police Mr. Papania. You went there to try and up his price on Seagram?

A. Yes, sir.

Q. When you make the statement that you were not policing for Seagram, you are making an incorrect statement?

A. I don't think so. I am not trying to make an incorrect statement. I don't know what you are driving at. I went out to sell them to take the regular profit. I thought they didn't make enough profit.

Q. You were going to give your views on an economical price maintenance.

A. Yes, sir.

Q. You weren't going there to sell them goods?

A. I have other lines of merchandise.

Q. But you weren't going there to sell them Seagram's products?

A. No, sir.

Q. You weren't going to sell Katz & Besthoff Seagram's products?

A. No. I don't want them to cut out our prices and preferred not to sell them goods if they were going to cut our prices.

Q. Did you go to Chapital and tell him not to sell for less?

A. No, Sir.

Q. What did you go there for?

A. Routine call to sell whatever merchandise he wanted to buy.

Q. Then you went there to sell him goods?

A. Certainly.

Q. And it is a coincidence that he happened to run an ad a few days before?

A. Yes, Sir.

Q. And the same thing is true as to B & W on Canal and Broad Streets?

A. Yes, Sir.

Q. And the same thing holds true with respect to Papania?

A. It isn't quite so with Mr. Papania, because we had a lawyer file suit against Papania for selling it for \$3.09.

Q. What did you do with that suit?

A. He came to our office Monday morning and asked us not to take him to Court.

Q. You withdrew that suit voluntarily?

A. I think he asked us to withdraw it.

Q. Did you make any charge against him for violating the Fair Trade Act?

A. I know we didn't go to Court with him. I want to state the thing right. I think Mr. Goldring can better advise you on that.

Q. You brought it up. I just want the facts. You didn't bring suit against him for violating the Fair Trade Act?

A. That's right.

Q. You didn't bring suit against him for violating Act No. 360?

A. That's correct.

Q. Why didn't you bring suit for violating the Fair Trade Law?

A. I don't think Magnolia Liquor has a contract with the retailer, or did we have a contract with the retailers to enforce the Fair Trade Act?

Q. Have you been back to Schwegmann since that time?

A. No, I haven't.

Q. Have you been back to Schwegmann Brothers in the last eight days to see what he is selling your Seagram products for?

A. No, Sir.

Q. Had you ever been to Schwegamann before that?

A. Yes, Sir.

Q. You had called on him before?

A. Yes.

Q. Schwegmann didn't run any advertisement in the local Papers on Seagram products for less than the prices that Seagram maintains, that you know of?

A. Not that I know of, not recently.

Q. Schwegmann was not one of the advertisers since Act 360 went into effect?

A. I don't believe so.

Q. You went on your routine sales trip to all the people selling Seagram products at a cut price?

A. No, I don't think Walgreen's advertised it. I don't think that Solari's had run an ad on our merchandise at that time on Seagram.

Mr. Stone:

That is all.

Mr. Suthon:

That is all.

MANFRED WILLMER, Witness being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination,

By Mr. Suthon:

Q. Please state your name?

A. Manfred Willmer.

Q. Mr. Willmer, do you know Mr. Anthony Papania of Pap's Liquor Store?

A. Yes, Sir.

Q. There has been some testimony here about Magnolia Liquor Company filing suit against Mr. Papania and that suit discontinued. Were you present at the time anything was done about the discontinuance of that suit?

A. Yes, Sir.

Q. Was Mr. Papania then present?

A. Yes, Sir.

Q. I show you two documents which I will mark Willmer-1 and Willmer-2; and which purport to bear the signature of Anthony Papania and ask you if those documents were signed by Anthony Papania in your presence?

A. Yes, Sir, they were.

Offer: Mr. Suthon:

I now offer in evidence the two documents identified by the witness as having been signed by Mr. Anthony Papania in his presence. The one marked Willmer-1 is headed "Statement of Mr. Stephen Goldring, President of Magnolia Liquor Company, Inc., and reads as follows: (Counsel reading statement to the Court.) The witness testified it was signed by Mr. Papania in his presence.

The other document is dated December 14, 1949. (Counsel reading document to the Court.)

Q. Mr. Willmer, I note the document marked Willmer-2 is dated November 14, 1949. The document which I marked Willmer-1 is undated. Were those two documents signed at the same time or different times?

A. They were signed at the same time.

Q. What date were they signed on?

A. I remember it was Monday. I would have to consult a calendar to be specific as to the date. Yes, that was Monday, November 14, 1949.

Offer: Mr. Suthon:

I also desire to offer in this connection certified copy of record in suit No. 293,699 for the Civil District Court for the Parish of Orleans, State of Louisiana, being a suit by Magnolia Liquor Company, Inc. and Vincent J. Randazzo versus A. Papania d/b/a Paps Food Store or Paps Liquor Store, marking it for identification Willmer-3.

The Court:

Let it be admitted.

Mr. Stone:

No objection.

Cross Examination.

By Mr. Stone:

Q. Mr. Willmer, who prepared this statement which carries the heading: "Statement of Mr. Stephen Goldring, President of Magnolia Liquor Company, Inc."?

A. I think it was prepared by our attorney.

Q. Your attorney prepared this for Mr. Papania's signature?

A. Yes, he prepared the statement.

Q. Whose statement is this, Mr. Goldring or Mr. Papania's?

A. It is the statement of Mr. Goldring.

Q. Did Mr. Goldring sign this statement?

A. His signature is not on there.

Q. Is it a statement of Mr. Papania or Mr. Goldring?

A. It is a statement of Mr. Goldring.

Q. Mr. Goldring didn't prepare it. Your attorney prepared it?

A. Yes.

Q. For whom was the statement furnished?

A. For the Press.

Q. Did it appear as a statement of the attorney or a statement of Mr. Papania?

A. I don't know.

Q. What did you have to do with preparing this statement?

A. I had nothing to do with it.

Q. How did you know it was a statement by Mr. Papania.

A. I didn't identify it as a statement by Mr. Papania.

Q. Mr. Papania told you the statement was prepared by Mr. Goldring?

A. Yes, Sir.

Q. You took it to Mr. Papania for signature?

A. Yes, Sir.

Q. That is the reason you testified to it?

A. Yes, Sir.

Q. You stated Magnolia Liquor Company would enforce fair trade agreements. Does that mean it would enforce fair trade agreements with respect to Seagram products?

A. I can't answer that.

Q. Then you don't know what the meaning of this statement is?

A. I wouldn't say that either.

Q. All you can identify is that Mr. Papania signed it?

A. Yes, Sir.

Q. As salesman of Magnolia, I ask you does Magnolia fair trade the prices on Seagram products?

A. We have urged everyone to do so.

Q. Does Magnolia enforce it?

A. I don't think we have authority to do it.

Q. When Mr. Goldring makes the statement that Magnolia Liquor Company is going to enforce a fair trade agreement, Mr. Goldring makes the statement without authority?

A. I don't know.

Q. Mr. Goldring hasn't authority to enforce a fair trade agreement?

A. I can't answer that yes, or no, Sir.

Mr. Stone:

No further questions.

Mr. Suthon:

That is all, Mr. Willmer.

STEPHEN GOLDRING, Witness, being duly sworn on behalf of plaintiff, was examined and testified as follows:

Direct Examination.

By Mr. Suthon:

Q. Please state your name?

A. Stephen Goldring.

Q. Mr. Goldring, what company are you connected with and what is your connection?

A. In New Orleans with the Magnolia Liquor Company as president. I am president of the Sazarac Company the same.

Q. Are you also a stockholder in the Magnolia Liquor Co.?

A. Yes, Sir.

Q. How long have you been connected with the Magnolia Liquor Company here?

A. Since its organization.

Q. What business is the Magnolia Liquor Company, Inc. in?

A. Wholesale Liquor business.

Q. What products of Seagram do you sell, do you recall?

A. Seagram V O; Seagram 7 Crown, Ancient Bottle Gin.

Q. How long has Magnolia been handling Seagram products in this locality?

A. Since 1944.

Q. There has been testimony here about a suit of the Magnolia Liquor Company, Inc. in the Civil District Court of the Parish of Orleans, No. 293,699, against A. Papania d/b/a Paps Food Store and/or Paps Liquor Store, in which Vincent J. Randazzo sued with Magnolia Liquor Co., Inc. Did you have any connection with filing that suit? I show you copy of the record in that suit marked Willmer-3?

A. Yes, we instituted that suit.

Q. Why did you file the suit?

A. Because the price of Seagram 7 Crown advertised in the Papers being sold at, was called to my attention and the price was below even Mr. Papania's cost price.

Q. After the filing of that suit did you have anything to do in connection with the settlement of that suit, and if so, what?

A. Yes, Sir. When that suit was filed Mr. Papania came into my office and he told me he did not know he was violating any law and he didn't want to violate any law and he would do anything that was right in order to stop the case. My advice to him was we were only interested in getting the prices raised, how could he sell below cost price? His argument to me was that Mr. Schwegmann was one of his competitors and he knows that he cuts prices,

and he knew of customers that went to Schwegmann's store, and that was the reason he did it, and it cost him \$1,000.00 one weekend. I consulted my attorney, and Mr. Papania said he would not cut the prices any more and he would sell it at the \$4.24 price. Then I discontinued the suit.

Q. I show you now two documents which purport to bear the signature of Anthony Papania already offered in this case and offered as Willmer-1 and Willmer-2, and ask you if those documents had anything to do in connection with the dismissal of this suit?

A. These are the documents which I gave to Mr. Willmer to have signed. One document is the statement of Mr. Goldring signed by Mr. Papania, and he agreed to sign it and we gave it to the Press to show that the case was discontinued, because Mr. Papania agreed to raise his prices. This other document here was signed by Mr. Papania also.

Q. Did you see Mr. Papania sign it?

A. I didn't see him sign it. I believe it was signed at his store. They were not signed in my presence.

Q. Who brought them to you after they had what appears to be the signature of Mr. Papania on them?

A. I gave them to Mr. Willmer, I don't recall the exact incident, but he either gave them to me or to Mr. Steeg. I don't recall exactly who he gave them to.

Q. After you got these documents what did you do about the suit?

A. Nothing else has been done since then.

Q. Didn't you authorize Mr. Seeg to dismiss the suit after you got these documents?

A. Yes, I authorized Mr. Steeg to dismiss the suit, but I don't know what action has been taken. That was in his hands.

Mr. Suthon:

That is all.

Cross Examination.

By Mr. Stone:

Q. That statement is labelled: "Statement of Mr. Stephen Goldring, President of Magnolia Liquor Company, Inc." Did you personally prepare that statement, Mr. Goldring?

A. I discussed it with my attorney, Mr. Steeg, who typed it in his office at my instructions.

Q. Did you prepare the contents of that statement personally for Mr. Steeg's stenographer to transcribe?

A. I didn't dictate it to his stenographer, but I read the statement before it went to Mr. Papania.

Q. You are familiar with the statement, of course?

A. I didn't read the full statement right now, but I did read it at the time.

Q. Look at this statement and tell me if it is correct so far as you and the Magnolia Liquor Company are concerned?

A. In the first paragraph it says: "Mr. Anthony Papania has contacted us concerning our law suit against him for violation of the Unfair Sales Practice Act." This first statement is exactly true and is the way I told it to Mr. Steeg.

Q. Read the whole document and analyze it?

A. You want me to read it out loud?

Q. No, read it to yourself.

A. (Witness does as requested). What is your question now?

Q. Does that document reflect the true statement with respect to you and the Magnolia Liquor Company and your position on the matters that are referred to in that statement?

A. It reflects my personal opinion.

Q. Your personal views and also views of the Magnolia Liquor Company?

A. When you talk about Magnolia, I have to have discussions on any company policy with my partners.

Q. Is it a partnership or corporation?

A. Corporation.

Q. Aren't you president of that corporation?

A. I am.

Q. Did you discuss the signing of this statement with your other officers or partners?

A. No.

Q. They didn't know anything about this?

A. I don't know whether they knew anything about it. I didn't discuss that particular statement with them.

Q. You handled it yourself?

A. Yes, Sir.

Q. Does Magnolia Liquor Company enforce fair trade prices on Seagram products in this area?

A. No, Sir.

Q. Magnolia Liquor Company has nothing to do with the fixing of fair trade prices on Seagram products in this area, does it?

A. No, Sir.

Q. The fixing of fair trade prices and the enforcement of the fair trade prices together with the policing of accounts in this area are all the function of Seagram Distillers Corporation?

A. I don't know who is the policeman on it, or who does the policing—

Q. I asked you whether or not the function of fixing the fair trade prices, the enforcing of fair trade prices and the policing of fair trade prices is on Seagram or Magnolia in this area?

A. I take it, it is on Seagram.

Q. It is not on Magnolia then?

A. Not to my knowledge.

Q. Magnolia doesn't do any policing in this area to see whether fair trade prices are being violated?

A. If I saw prices being cut I would notify Seagram.

Q. You would not go out to the various accounts to see whether or not they were violating the fair trade price?

A. No, Sir.

Q. Who in your corporation would do that to find out whether they were violating fair trade prices, if anybody?

A. Only the salesmen call on the account regularly.

Q. You and your vice-president, Mr. Woldenberg, would not go out to see if they were violating the fair trade prices in the trade?

A. Not as a practice.

Q. The hardly ever do it?

A. No, Sir.

Q. Your statement here: "it is our intention to enforce this," that statement is not true. You are not making a true statement when you say you are going to enforce fair trade?

A. Not on fair trade, but on unfair trade.

Q. Do you say unfair or fair here?

A. I said fair.

Q. What did you mean by making that statement?

A. Exactly what it says.

Q. What does it say?

A. "The suit was brought by Magnolia Liquor Co., Inc. was brought to enforce the provisions of the law, and it is our intention to enforce this, or any other Louisiana Statute, or any fair trade agreement, relating to the products which we distribute. We recognize that the Alcohol Beverage Control—"

Q. Let me stop you there. You do take upon yourself the enforcement of fair trade agreements on Seagram products

A. I do as far as this. It says fair trade agreement, I should have said unfair trade agreement.

Q. When you say fair trade agreement you mean unfair trade agreement?

A. We couldn't take an injunction under the Fair Trade Act.

Q. If you had inquired you would have found out that you could. You did not take action on the Fair Trade Act at that time on Papania?

A. No, Sir.

Q. But you declared to the public that you had the power to fair trade and enforce that Act?

A. In this statement it states that.

Q. And you state you are familiar with everything in that statement?

A. I said I told my attorney who prepared it.

Q. Why didn't you proceed to your attorney and find out if you were correct?

A. I don't think there was a fair trade agreement in effect. The present fair trade agreement was sent out, to my knowledge—this ad appeared a day or two after the law was declared unconstitutional.

Q. The ad appeared on November 10 in the Item and on November 11 in the Picayune. That is my information, if that will help you any. So you proceeded against him immediately after that on the unfair sales act?

A. That is correct.

Q. And after November 11 there was no Fair Trade Act?

A. I can't say.

Q. I ask you whether or not as President of Magnolia, the corporation that distributes exclusively in this area, that if there was any unfair trade agreement in Louisiana on Seagram 7 Crown whiskey? That question can be answered yes, or no.

A. I can't answer the question yes or no without explaining—

Q. Answer yes or no and then explain it?

A. Yes, I thought there was a fair trade agreement.

Q. Now explain it?

A. I didn't know if the act was good.

Q. What, act?

A. The voluntary fair trade agreement act.

Q. You didn't know whether it was good or not?

A. No, I am not an attorney.

Q. By good, you mean economically sound?

A. No. First of all, I knew we could take no action.

Q. What do you mean by that?

A. I understand there had to be a six percent mark up on Seagram products, and Mr. Papania was selling merchandise below his cost.

Q. You felt the enforcement of the fair trade act was entirely up to Seagram Distillers?

A. That is correct.

Q. And not up to you?

A. That is correct.

Q. So that when you made that statement to the Press that you had Mr. Papania sign that statement, you were not making a true statement with respect to fair trade?

A. According to the legal terminology, no.

Q. You were not making a correct statement?

A. According to the legal terminology, no.

Q. Now Magnolia—and I think I am right when I say Mr. Woodenberg has testified to this—Magnolia does not fix the prices on Seagram products that will be the subject of fair trade contracts, but that particular function is in Seagram Distributors Corporation, or some of their superiors?

A. That is correct.

DECREE GRANTING PRELIMINARY INJUNCTION.

Filed: December 20th, 1949.

United States District Court Eastern District of Louisiana,
New Orleans Division.

Seagram Distillers Corporation,
versus No. 2608 Civil Action.
Schwegmann Brothers et al.

This cause having been heard submitted and taken under advisement on the motion of plaintiff for a preliminary injunction, and on the defenses to demand for a preliminary injunction presented by defendants in their motion to dismiss and in their answer, and the Court having taken time to consider, and the law and the evidence being in favor of plaintiff and against defendants:

It Is Ordered, Adjudged And Decreed, That the motion to dismiss of defendants be denied.

It Is Further Ordered, Adjudged and Decreed, That the motion for a preliminary injunction herein be and the same is hereby granted and accordingly, that upon the filing of a bond in this cause in the sum of \$1000.00 the said defendants, the partnership of Schwegmann Brothers, and the individual partners therein, John Schwegmann, Jr., Paul Schwegmann and Wilfred I. Meyer, and each of them, their officers, agents, servants and employees, and all persons acting in aid of or in conjunction with them, or any of them, be and they are hereby enjoined and restrained, pending the final hearing of sooner determination of this cause, from in any manner or by any means, direct or indirect, advertising for sale or offering for sale or selling any of the products or commodities of plaintiff,

Seagram-Distillers Corporation, which bear, or the labels or containers of which bear, the trade-marks or name of plaintiff, which defendants now have or which they may hereafter acquire, at prices less than the minimum prices shown for each of said products in the minimum price schedule of plaintiff dated November 14, 1949, and annexed to the complaint herein as Exhibit "C", which products and the respective minimum prices scheduled therefor are as follows:

Brand	Minimum Consumer Retail Price				
	Half-Gallon	Quart	Fifth	Pint	Half-Pint
"Seagram's Seven Crown Blended Whiskey	\$10.42	\$5.26	\$4.24	\$2.68	\$1.37
"Seagram's V. O. Canadian Whiskey—A Blend			5.87	3.70	1.88
"Ancient Bottle Distilled Dry Gin			3.93	2.48	1.27

"The prices established above for each brand and size apply to all alcoholic beverages in the particular size which are sold under that brand name, regardless of differences, if any, in class, type, formula, proof, etc.

"The said prices include all Federal, State and City taxes except State and City sales taxes. These prices are applicable to all sales to consumers in the City of New Orleans and are not applicable outside the City of New Orleans." as amended by the minimum price schedule issued by plaintiff under date of December 1, 1949, effective December 6, 1949, so as to incorporate in said minimum price schedule the following:

"A discount of not to exceed 10% is authorized on full case sales."

or at prices less than those which may be shown in any future minimum price schedule hereafter issued by plaintiff under and pursuant to its contracts with retailers, entered into in conformity with the Louisiana Fair Trade Act, and from making any regates, refunds, discounts or concessions of any kind or character to purchasers in connection with the purchase of, or which will aid in decreasing the selling price of said products or commodities below said minimum selling prices, save and except only in those cases wherein defendants are (a) closing out their stock for the purpose of discontinuing delivering any of such commodities, or (b) when the goods are damaged or deteriorated in quality and notice is given to the public thereof, or (c) when the sale is by an officer acting under the orders of any Court.

Thus Done And Entered at New Orleans, Louisiana on the 20th day of December, 1949.

(S.) J. SKELLY WRIGHT,
United States District Judge.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
UPON MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION.**

Filed: January 10, 1950.

(number & title omitted.)

The Court hereby makes the following Findings of Fact upon the verified complaint, the exhibits attached thereto, the affidavits offered and filed in support of the motion

for a preliminary injunction, and the evidence offered by both parties on the trial of the motion.

Findings of Fact.

1. Plaintiff is a Delaware Corporation and for jurisdictional purposes a citizen of the State of Delaware. Defendants are a commercial partnership composed of John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, all residents of New Orleans, Louisiana, and all defendants are for jurisdictional purposes citizens of the State of Louisiana. The matter in controversy herein exceeds exclusive of interest and costs, the sum or value of Three Thousand (\$3,000.00) Dollars.

2. Plaintiff sells and distributes to wholesalers, and, for some years past, has sold and distributed to wholesalers on a large scale certain commodities (whiskey and gin) which bear the trade-marks owned by its parent company, Joseph E. Seagram and Sons, Inc. Plaintiff's parent corporation, the owner of these trade-marks, has specifically authorized plaintiff to establish and to enforce in Louisiana minimum retail prices for its trade-marked beverages. These commodities bearing the trade-marks as herein set forth, are and have been sold on a large scale by retailers to consumers in the City of New Orleans and elsewhere in the State of Louisiana and throughout the United States. The good will attached to these commodities bearing the trade-marks owned by plaintiff's parent corporation, and the demand therefor among the distributing trade and the consuming public, are and have been of substantial value to plaintiff's parent corporation throughout the United States, in the City of New Orleans, and elsewhere in the State of Louisiana. Plaintiff's rights, as the sole distributors for these products in the State of

Louisiana and in the City of New Orleans, are well worth substantially in excess of Three Thousand (\$3,000.00) Dollars. The commodities bearing the trade-marks of plaintiff's parent corporation are and have been in free, fair, and open competition with other commodities of the same general class, produced by others throughout the United States, in the City of New Orleans, and elsewhere in the State of Louisiana.

3. Joseph E. Seagram and Sons, Inc., is an Indiana corporation which manufactures "Seagram's 7 Crown", "Seagram 5 Crown", blended whiskies, "Seagram Ancient Bottle", distilled dry gin, and "King Arthur", distilled London dry gin. Joseph E. Seagram and Sons, Ltd., an affiliate of Joseph E. Seagram and Sons, Inc., is a Canadian corporation which manufactures "Seagram V. O.", "Seagram '83", blended whiskies, and "Seagram Pedigree Rye or Bourbon", straight whiskey. None of these products is manufactured in Louisiana. The trade-marks, "Seagram" and "King Arthur", are owned by Joseph E. Seagram and Sons, Inc., and registered in the United States Patent Office in the name of that corporation. Plaintiff, Seagram Distillers Corporation, is a Delaware corporation wholly owned by Joseph E. Seagram and Sons, Inc. It is the exclusive distributor in the State of Louisiana and other states for products bearing the Seagram trade-marks.

4. Retail prices on the Seagram products are established by means of fair trade contracts, substantially identical through the United States, executed, pursuant to local law, between local retail liquor dealers and plaintiff. Pursuant to authority delegated by its parent corporation, the trade-mark owner, plaintiff fixes retail price schedules for its parent's trade-marked products. Excluding variations depending upon freight rates and local taxes, this retail

price is uniform in those states which permit retail price maintenance on alcoholic beverages. In states in which retail prices established by fair trade contract are binding upon non-signing retail dealers, notice of the retail fair trade contract price then is given to local retail dealers. In this case, prices schedules and notices were prepared in New York and mailed to defendant and other Louisiana retailers from Coral Gables, Florida. Authority to enforce retailer maintenance of the retail prices is vested in plaintiff.

5. Plaintiff, a distributor of Seagram products in Louisiana, warehouse no goods in this state. Orders are received in Louisiana but processed out of Louisiana. Plaintiff does not do business with wholesalers generally, but operates through "exclusive" wholesalers, who are appointed to handle its products. On occasion, plaintiff's agents assist these local wholesalers by accompanying their sales representatives in soliciting sales of the merchandise distributed by plaintiff. Neither the retailer nor the exclusive wholesaler fixes the retail price.

6. After the adoption of Act 13 of the Louisiana Legislature of 1936 and the Act of Congress of Aug. 17, 1937, c 690, Title VIII, 50 Stat. 693, 15 USCA 1, plaintiff on various dates in March to June, 1948, entered into identical written contracts with a number of retailers in the State of Louisiana, including retailers in the City of New Orleans. Under the contract terms, these contracts were renewed by the inaction of the parties one year from the dates of their execution. On November 10 and November 11, 1949, plaintiff entered into identical contracts with six retailers in the City of New Orleans. Plaintiff did not enter into any such contracts with retailers in the City of New Orleans or in the State of Louisiana on November 12,

1949, or any date thereafter. These contracts were made with respect to the commodities sold and distributed by plaintiff and bearing the trade-marks owned by its parent company. Copies of the form upon which all of these written contracts were entered are attached to plaintiff's complaint as "Exhibit A".

7. During the interval from June, 1948, until November 10, 1949, plaintiff made no effort to enforce the contracts entered into in March to June, 1948, and renewed in March to June, 1949. On or about July 28, 1948, the Louisiana Alcoholic Beverage Control Act (La. Act 360 of 1948) became effective. Section 24 of this statute fixed minimum prices for alcoholic beverages at all distributive levels, including the retail level. The minimum prices established for plaintiff's products were substantially the same as those established by previously executed fair trade contracts. Efforts to enforce these prices were made by the Louisiana Board of Alcoholic Beverage Control and Act 360 of 1948 from July 28, 1949, until November 7, 1949. On this latter date, the Louisiana Supreme Court held invalid the price fixing provisions of the Alcoholic Beverage Control Act. The contracts entered into on November 10 and 11, 1949, are still in force and effect. It is unnecessary to determine whether the 1948 contracts and the renewals thereof are in full force and effect.

8. Following telegraphic notice on or about November 10, 1949, to all retail liquor dealers in the State of Louisiana, in the form of "Exhibit B" attached to the complaint, plaintiff, on or about November 14, 1949, established at its head office in New York City a new schedule of minimum prices under its contracts in the form of "Exhibit A" attached to the complaint, which new schedule of minimum prices was in the form of "Exhibit C" attached to the complaint and was effective November 14, 1949. This new

schedule of minimum prices was promptly notified to the trade generally and to the other parties to the contracts with plaintiff in the form of "Exhibit A" attached to the complaint through the mailing of copies thereof by plaintiff to such parties. This schedule of minimum prices in the form of "Exhibit C" attached to the complaint is the schedule of minimum prices in force between plaintiff and other contracting parties as of the dates material to this action, under the contracts in the form of "Exhibit A" attached to the complaint. These schedules of minimum prices were modified effective December 6, 1949, by an amendment allowing a discount not to exceed 10% on full case sales. As thus amended, these schedules constitute the schedule of minimum prices currently in force between plaintiff and other contracting parties under the contracts in the form of "Exhibit A" annexed to the complaint.

9. Defendants have never entered into any contract with plaintiff in the form of "Exhibit A" attached to the complaint, nor have they entered into any similar contract with plaintiff.

10. Defendants, with full knowledge of the contracts between plaintiff and other retailers in the City of New Orleans and elsewhere, in the State of Louisiana in the form of "Exhibit A" attached to the complaint, and with full knowledge of the minimum price schedules set forth in "Exhibit C" attached to the complaint, on various occasions have offered for sale and sold at retail in their place of business in the City of New Orleans, State of Louisiana, commodities bearing the trade-marks owned by plaintiff's parent corporation at various prices below the minimum prices specified in said minimum price schedules in force at the time of such sales by defendants. Defendants will continue such selling activities unless enjoined and restrained therefrom.

11. Plaintiff has filed in this Court several other suits of a similiar nature against other retailers, and has also made, or caused to be made, extra-judicial efforts to persuade other retailers, to desist from offering, advertising, and selling the commodities bearing its trade-marks and name at retail at prices less than those set forth in "Exhibit C". Plaintiff has not discriminated against defendants in the enforcement of the rights of plaintiff asserted by this suit, and has used due diligence in efforts to enforce those rights generally.

Conclusions of Law.

The Court hereby enters the following Conclusions of Law:

1. The selling activities of defendants described in Finding of Fact No. 10 constitute unfair competition, violative of the legal rights of plaintiff, and are actionable by plaintiff; La. Act 13 of 1936; 15 USCA 1, *Pepsodent Co. v. Krauss Company, Ltd.* International Cellucotton Products Company v. Krauss Company, Ltd., 200 La. 959, 9 So. 2d 303; *Old Dearbon Distributing Co. v. Seagrams Distillers Corp.* 299 U. S. 183, 57 S. Ct. 139, 811. Ed. 108; 106 A. L. R. 1476; *Mennen Co. and Bristol-Meyers Co. v. Krauss Co. Ltd.*, 134 F. 2d 348 (CCA 5, La.); *Pepsodent Co. v. Krauss Co., Ltd.*, 56 F. Supp. 922 (D. C. La.)

2. Defendants have attempted to show that plaintiff's actions in fixing retail prices constitute a restraint of trade between the states. No finding on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act. Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 USCA 1; *Pepsodent Co. v. Krauss Co., Ltd.*, 56 F. Supp. 922 (D. C. La.)

3. Plaintiff has no adequate remedy at Law and is therefore entitled to injunctive relief.

4. A preliminary injunction should be issued herein as prayed for by plaintiff.

(S.) J. SKELLY WRIGHT,
United States District Judge.

New Orleans, Louisiana, January 10th, 1950.

**NOTICE OF APPEAL TO COURT OF APPEALS FOR
THE FIFTH CIRCUIT.**

Filed: January 17, 1950.

United States District Court Eastern District of Louisiana,
New Orleans Division.

Seagram Distillers Corporation,
versus No. 2608 Civil Action.
Schwegmann Brothers, et al.

To The Honorable, The United States District Court for
the Eastern District of Louisiana, New Orleans Division:

Notice is hereby given that Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants above named, hereby appeal to the Court of Appeals for the Fifth Circuit from the judgment

and decree granting a preliminary injunction entered in this action on December 21, 1949.

WISDOM AND STONE,
JOHN MINOR WISDOM,
SAUL STONE,
PAUL O. H. PIGMAN,
Attorneys for Defendant.

312 Whitney Building,
New Orleans, Louisiana.

By JOHN MINOR WISDOM.

STIPULATION OF RECORD ON APPEAL.

Filed. 3/16/50.

(number & title omitted.)

It is hereby stipulated by and between Seagram Distillers Corporation, plaintiff and appellee, and Schwegmann Brothers, John Schwegmann, Jr., Paul Schwegmann, and Wilfred I. Meyer, defendants and appellants in the above entitled cause, by and through their respective attorneys, that the following parts of the record, proceedings, and evidence in this cause are hereby designated to be included and shall be included in and constitute the record on appeal in this cause:

- (1) Bill of Complaint;
- (2) Fair trade contract form (Exhibit A), annexed to complaint;

- (3) Affidavit of Sidney E. Rudman, annexed to complaint;
- (4) Motion to dismiss;
- (5) Answer to complaint;
- (6) Stipulation;
- (7) Findings of fact and conclusions of law;
- (8) Decree granting a preliminary injunction;
- (9) Notice of Appeal;
- (10) Order extending time to file record in the Court of Appeals;
- (11) This stipulation;
- (12) Appellants' statement of the points upon which they intend to rely;
- (13) The following portions of the official Court reporter's transcript of the evidence in these proceedings:

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3.....	1-13; 18-25
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JOHN MINOR WISDOM,
 (John Minor Wisdom,)

Attorney for Defendants-Appellants.

312 Whitney Building,
 New Orleans, Louisiana.

MONROE & LEMANN,
 (Monroe and Lemann,)

Solicitors for Plaintiff-Appellee.

1424 Whitney Building,
 New Orleans, Louisiana.

STATEMENT OF POINTS.

Filed: March 16th, 1950.

(number & title omitted.)

Defendants-Appellants intend to rely on the following points in their appeal to the Court of Appeals for the Fifth Circuit:

I.

The Court erred in holding that the Miller-Tydings Amendment to the Sherman Anti-Trust Act permits price fixing in an interstate transaction as to one not a party to a fair trade contract.

II.

The Court erred in not dismissing plaintiff's complaint for failure to state a claim upon which relief could be granted. The Court should have dismissed the complaint on the ground that the fair trade contracts which constitute the basis of plaintiff's cause of action are null and void under the law of Louisiana in that the contracts lack mutuality, because plaintiff incurred no obligation thereunder; or, in the alternative, if an obligation on the part of plaintiff inferentially exists, this obligation is subject to purely potestative conditions.

JOHN MINOR WISDOM,

(John Minor Wisdom,)

Attorney for Defendants-Appellants.

312 Whitney Building.

CLERK'S CERTIFICATE.

I, A. DALLAM O'BRIEN, JR., Clerk of the District Court of the United States for the Eastern District of Louisiana do hereby certify that the foregoing 101 pages contain and form a full, true and complete transcript of the record, in the case entitled "Seagram versus Schwegmann Brothers, Et Al." No. 2608 of the Civil Action Docket of this Court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and seal of said Court at the City of New Orleans, La., this 23rd day of March, A. D. 1950.

A. DALLAM O'BRIEN, JR.,
Clerk.

By ANDREW J. BACON,
Deputy Clerk.

(Seal)

[fol. 93] JOINT MOTION AND ORDER TO CONSOLIDATE CAUSE
FOR BRIEFING AND ARGUMENT—Filed March 30, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 13-162

SCHWEGMANN BROTHERS, ET AL., Appellants,

vs.

CALVERT DISTILLERS CORPORATION, Appellee

JOINT MOTION TO FIX CAUSE FOR ARGUMENT

To the Honorable the United States Court of Appeals for
the Fifth Circuit:

The appellants and the appellee, appearing herein by and through their respective attorneys, move the Court to assign this cause for oral argument on some date prior to the date of adjournment of the Court for the present term, and to consolidate this cause, for purposes of oral argument, with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Calvert Distillers Corporation, Appellee, No. 13-162 of the docket of this Court, for the following reasons:

(1) This cause is a preference cause, involving a question of appellee's right to injunctive relief against appellants; the preliminary injunction granted by the District Court herein is now in full force and effect and binding upon appellants;

(2) This cause involves substantially the same questions of law as are involved in the cause now pending before this Court, entitled Schwegmann Brothers, et al., vs. Calvert Distillers Corporation, No. 13-162, in which cause the parties have filed contemporaneously with this motion a similar motion, praying that both causes may be consolidated for purposes of oral argument before this Court at the same time;

[fol. 94] (3) All parties desire that this matter be disposed of as expeditiously as possible and, to the end of dividing the time for preparing briefs equitably between them and also having both briefs served at least five days

before the argument date, they hereby agree, subject to the approval of the Court, that appellants' brief shall be delivered to the appellee by a date halfway between the date of notice of completion of the printing of the record and the date five days before the argument date, and appellee's brief shall be delivered to appellants five days before the argument date.

(4) The successor to the commercial partnership, one of the appellants herein, is now a party defendant in three causes presently pending in the District Court of the United States for the Eastern District of Louisiana, in which causes questions of law substantially similar to those involved herein must be argued and decided; decision in the instant cause may be of controlling authority in these causes now pending in the District Court;

Wherefore, appellants and appellee pray that this cause may be assigned and fixed for oral argument at New Orleans, Louisiana for some date before the adjournment of this Court for the present term; that their agreement, relative to division of the time available for preparing briefs be approved, and that this cause be consolidated for purpose of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Calvert Distillers Corporation, Appellee, No. 13-162 of the docket of this Court.

/s/ Wisdom & Stone, Paul O. H. Pigman, Wisdom and Stone, 312 Whitney Building, New Orleans, Louisiana, /s/ Monroe & Lemann, Walter J. Suthon, Jr., Monroe and Lemann, 1424 Whitney Building, New Orleans, Louisiana.

[fol. 95]

Order

Considering the foregoing motion,

Let this cause be and it is hereby assigned and fixed for oral argument before this Court at New Orleans, Louisiana on the 7th day of June, 1950, appellants' brief to be delivered to appellee by the date halfway between the date of notice of completion of the printing of the record and the date five days before the argument and appellee's brief to be delivered to appellants five days before the argument date.

Let this cause be consolidated for purposes of oral argument with the cause now pending before this Court, entitled Schwegmann Brothers, et al., Appellants, vs. Calvert Distillers Corporation, Appellee, No. 13-162 of the docket of this Court.

New Orleans, Louisiana.

March 30, 1950.

/s/ Wayne G. Borah, Judge.

[fol. 96] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

No. 13163

ARGUMENT AND SUBMISSION

Extract from the Minutes of June 7, 1950.

SCHWEGMANN BROTHERS, ET AL.,

versus

SEAGRAM DISTILLERS CORPORATION

On this day this cause was called, and after argument by John Minor Wisdom, Esq., for Appellants and Walter J. Suthon, Jr., Esq., for Appellee, was submitted to the Court.

[fol. 97] OPINION OF THE COURT FILED—July 27, 1950

IN THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH
CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellee

and

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM DISTILLERS CORPORATION, Appellee

Appeals from the United States District Court for the
Eastern District of Louisiana

(July 27, 1950)

Before HUTCHESON, Chief Judge, and McCORD and RUSSELL,
Circuit Judges.

HUTCHESON, Chief Judge: Based on diversity and amount, these two suits, brought under Sec. 2 of Act No. 13 of 1936, La. R. S. 51:391-396, the Louisiana Fair Trade [fol. 98] Act,¹ were for injunctions, preliminary and permanent.

Defendants appeared by answers and motions to dismiss, and; the applications for preliminary injunctions coming on for hearing, there were findings of fact and conclusions

¹ "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of Section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

of law in plaintiffs' favor, and a decree in each suit granting the preliminary injunction as prayed.

The defendant in each suit appealing, the two appeals were set and heard together, and now stand for disposition on appellants' two contentions.

One of these is that the so-called resale price maintenance contracts between plaintiffs and other retailers than defendants, on which enforcement of the fair trade act against the non-signing defendants is based, are null and void under the laws of Louisiana for want of mutuality or because of potestativity.

The second is that the scope of the resale price maintenance permitted (when valid under state law) by the Miller-Tydings Amendment² to the Sherman Act,³ relied on by plaintiffs to save their price fixing activities from the Sherman Act does not extend to resale price maintenance against defendants, non-contracting retailers.

-Appellees vigorously dispute the correctness of both of these contentions, and, by way of preliminary counterattack, contrary to the position taken in their pleadings and [fol. 99] on the trial, assert that the sales sought to be enjoined were wholly intrastate sales, therefore beyond the reach of the Sherman Act.

They admit: that each plaintiff operates on a nation wide scope and functions in interstate commerce; that each uses the mails interstate and functions in some respects from headquarters in New York in formulating the minimum price schedules under the fair trade contracts with various retailers in the several states having such statutes and in giving notice of these contracts and price schedules to all retailers in the state; and that the liquors which each plaintiff sells to Louisiana wholesalers are shipped in interstate commerce from points outside Louisiana to the purchaser in Louisiana following such sales.

They insist, however: that the reselling activities regulated by the injunctions herein represent the second intra-

² Act of Aug. 17, 1937. See Ch. 690, Title VIII, 50 Stat. 693, 15 U.S.C., Sec. 1.

³ Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U.S.C. Secs. 1-7.

state transaction in the sequence of events following the movement of these liquors into Louisiana in interstate commerce pursuant to sales made by the distributors to Louisiana wholesalers; that these wholesalers then sell intrastate to retailers; and that these in turn sell intrastate to their customers.

Appellants, on their part, point to the facts: that plaintiffs have expressly invoked the Miller-Tydings Act; that they have expressly alleged a plan of general interstate operation and activity, in control of price and restraint of trade; that they have tried the case below on the theory that interstate commerce was affected; and that they have, without distinction between interstate and intrastate sales, sought and obtained an injunction whose purpose and effect is to maintain the pattern of restraints on commerce between the states which the plan was designed to, and does, make effective.

Citing in their support *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, and *United States v. Frankfort Distilleries*, 324 U.S., 293, they urge upon us that appellees in thus focusing here on the particular sales made by appellants, have not only abandoned the theory on which the suit was brought and tried but have completely missed the point of decision in the *Miles* case, *supra*, at p. 400:

"That these agreements restrain trade is obvious. That, having been made, as the bill alleges, with 'most of the jobbers and wholesale druggists and a majority of the retail druggists of the country' and having for their purpose the control of the entire trade, they relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several States, is also clear. *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211; *Bement v. Natl. Harrow Co.*, 186 U.S. p. 92; *Montague & Co. v. Lowry*, 193 U.S. 38; *Swift & Co. v. U. S.*, 196 U.S. 375."

We agree with appellants that though the sales made by appellants were made intrastate, the transactions, the subject of this suit, so affect interstate commerce and the exertion of the power of congress over it as to bring plaintiffs' activities within the reach of the Sherman Act,

unless the Miller-Tydings Amendment to that act excludes them.⁴

This brush fighting, of appellees' making, attended to and out of the way, there remains in the way of our reach-[fol. 101] ing the real battleground of the case, the scope of the Miller-Tydings Amendment, only the equally thin skirmish line which appellants have thrown out in support of their contention that the so-called "Fair Trade Contracts" relied on to support the action are not contracts within the meaning of the Louisiana Fair Trade Act and the Miller-Tydings Amendment.

In our opinion, this position is as little tenable, is as easily turned and taken, as was the line behind which appellees fought their delaying action. In the first place, if we could agree with appellants' characterization⁵ of these contracts, we could not agree with their conclusion that they would be insufficient to support the statutory action here brought. For it is perfectly plain that whatever the legal and binding effect upon the parties of "these fair trade contracts", it is with "these fair trade contracts"

⁴ *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, 178 F. (2) 453; *Dr. Miles Medical Co. v. Park, U. S. v. Frankfort*, *supra*.

⁵ " 'Contract' is purely a courtesy title when it is applied to a so-called 'fair trade contract'. The word has about the same relation to contracts (as the law knows contracts) as the term 'fair trade' has to fair trade in which retail competition is eliminated. In the advertising slogan 'fair trade contract', 'contract' is a counter word used to convey the impression of a long-accepted, honorable, sacrosanct legal institution—the Mutual Agreement." * * *

"Although these are statutory actions brought against non-signing retailers, the actions are premised upon the existence of a fair trade contract. In support of their action, appellees annexed to each complaint a contract typical of all contracts executed by each appellee. The same form is used by both appellees. The contracts—which undoubtedly were drawn in New York and not by the able Louisiana attorneys for the appellees—are set forth in full in the transcripts."

the statutes in question deal, it is to give effect to "these fair trade contracts" that these statutes were drawn.

But, if we could agree that, in using the word "contract", the statutes meant to, and do, deal only with contracts which are enforceable between the parties, we think the points appellants make against the contracts in question here are strained and without substance, and [fol. 102] that they will not stand up in the light of the modern decisional tendency in Louisiana and elsewhere. This tendency is against too readily lending the aid of courts to defeat contracts on grounds of want of mutuality⁶ or the presence of a potestative condition.⁷ When, therefore, escape from an obligation is sought on these grounds, it is now settled law that courts will, where reasonably possible to do so, find a contract definite and enforceable.

Coming at last to the main battle ground, whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case, we find both appellants and appellees, instead of coming and sticking to this point, each setting up and completely outfitting a straw man of his own, the legislative history of the act as he claims it to be, and each furiously laying about to knock the other's straw man down.

It is not for one who asserts rights under a state statute to prove as a condition precedent to its enforcement that the legislature had the right to enact it. He may stand upon the presumption of validity until such presumption is overthrown. This is especially so in this case since it is admitted, as indeed it must be, that unless it is prohibited by federal law, the Louisiana Fair Trade law has been

⁶ *Geo. W. Armstrong v. So. Pro. Co.*, 5 Cir. (5-26-50), and cases cited; *Port Chester v. Müller*, 1 N.Y.S. (2) 802; 281 N.Y. 101; 22 N.E. (2) 253; *Calvert Dist. v. Nussbaum*, 2 N.Y.S. (2) 320; *Hutzler Bros. v. Remington*, 46 Atl (2) 101; *Shreveport Tractor v. Mulhaupt*, 48 So. 144; *Grace v. Arnaud's*, 121 So. 359; *Houbigant Sales v. Woods*, 196 Atl. 683.

⁷ La. Civ. Code, Arts. 2024; 2034; 2035; *Humble v. Guilory*, 33 So (2) 182; *Cockburn v. O'Meara*, 141 F (2) 779; *Conques v. Andrus*, 162 La. 73; 110 So. 93.

already determined to be a valid law of the state of Louisiana [fol. 103] and binding on consenters and non-consenters alike as a declaration of state fair trade policy which the state is competent to make.

It is admitted, too, that it has been held in *Old Dearborn Distill. Co. v. Seagrams Distill. Corp.*, 299 U.S. 183, that state statutes of this character do not violate any provision of the Constitution of the United States, though a fair trade agreement "constitutes an unlawful restraint of trade at common law and, in respect of interstate commerce, a violation of the Sherman Anti-Trust Act".

In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states.

In insisting, therefore, that the Miller-Tydings Amendment is ineffective to remove the prohibitions of the Sherman Act, as to non-signers, because it in terms refers to, and deals merely with, *price maintenance contracts which are valid by state law*, and does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly misconceive the issue.

[fol. 104] Likewise, appellees, when they devote a great part of their brief to the history of the act to demonstrate that it was the intent of Congress to cover laws binding non-signers, equally misconceive the issues, and take on a burden which they do not have to bear.

Agreeing, then, with appellants that the act is free from ambiguity and that there is no occasion to resort, or propriety in resorting, to its legislative history to find its meaning, we yet agree with appellees that, in comprehen-

⁸ *Pepsodent Co. & International v. Krauss Co.*, 9 So (2) 303; *Mennen Co. and Bristol-Meyers v. Krauss*, 134 F (2) 348.

sively and completely removing from the prohibitions of the Sherman Act *price maintenance contracts which are valid according to the law of a state*, the amendment removed every prohibition from, or impediment in the way of, the enactment by the states of fair trade laws, binding alike upon signers and non-signers.

This being so, it is wholly immaterial whether the Congress as a whole, or particular members of it,⁹ in enacting the Miller-Tydings Amendment, did or did not have in mind that there were state acts applying to non-signers as well as signers and, therefore, did, or did not, have in mind the specific intent that the amendment should be effective as well against non-signers as against signers.

Read on its face and interpreted in accordance with that reading, what the amendment did was to remove all Sherman Act restrictions on agreements restraining trade in states where, by the state law, these agreements had been validated as to intrastate commerce. Thus a non-signer finding himself pursued under a fair trade act and without remedy as to intrastate transactions, is bound by the terms and wording of the amendment to find himself [fol. 105] equally without remedy as to interstate transactions. For when he invokes the Sherman Act to prevent the enforcement against him of the state law, he is referred to the Miller-Tydings Amendment of it with the inquiry, "What are you complaining of, the agreements which establish a fair price?" and the answer, "The Sherman Act as amended now validates them." If the non-signer answers, "No, I am not complaining of the agreements. I am complaining of the act of the state, which, though I did not sign them, requires me to respect those agreements, whereas the amendment of the Sherman Act, to which you refer, did not refer to, or authorize, state action against non-signers." "Sorry", replies the Sherman Act, "but the amendment neither authorizes nor prohibits state legislation. The control it exercises is not over, the effect it has is not upon, legislation by the states. It is concerned with, and only with, the Sherman Act, legislation by Congress affecting interstate commerce. The

⁹ Cf. *Fleming v. A. H. Belo Corp.*, 121 Fed (2) at p. 212-213.

amendment, removing from the prohibition of that act 'contracts or agreements prescribing minimum prices for the resale of a commodity' * * * 'when contracts or agreements of that description are lawful as applied to intrastate transactions under' any state law, was enacted to, it did remove the Sherman Act as an obstacle in the way of completely effective state action, and there is nothing, therefore, that the Sherman Act can do for you."

Whatever then may be our views as to the unwisdom of the policy lying back of fair trade acts and the Miller-Tydings amendment, we are in no doubt that the judgment was right, and must be affirmed.

[fol. 106] RUSSELL, Circuit Judge, dissenting:

As to two of the underlying questions which should control the disposition of this case, we are all in agreement. That is that the transactions were so much in interstate commerce as to be subject to the exercise of Congressional power in the regulation thereof and, also, that the provisions of the Miller-Tydings Amendment, relaxing the regulations in protection of interstate commerce evidenced by the Sherman Act,¹ are so clear as to render improper resort to the legislative history of that Amendment in applying its terms.² The sole point of difference between us therefore is the effect which should be given this amendment when read in the light of its unambiguous language.

It seems clear to me that the majority opinion enlarges and extends the provisions of the statute to a scope not justified by the legislative language. I can not agree that the amendment, merely by excepting from the prohibition of the otherwise illegal "contracts and agreements" forbidden by the Sherman Act, "contracts and agreements prescribing minimum prices * * * when *contracts or agreements* (italics supplied) of that description are lawful as applied to intrastate transactions" under the State law,

¹ 16 U. S. C. A. §1-7.

² *Caminetti v. U. S.*, 242 U.S. 470; *Gemsco v. Walling*, 324 U.S. 244; *Ex Parte Collette*, 337 U.S. 55. *C. F. Sturges v. Crowninshield*, 15 U. S. C. A. §1-7.

likewise embraces within its exemption the provisions of any State *statute*, and this notwithstanding the only reference to such statute is that which might validate the "contracts and agreements." It may be further observed at this point, that the Miller-Tydings Amendment in no way sought to remove the prohibition against a "combination in the form of trust or otherwise, or conspiracy, in [fol. 107] restraint of trade or commerce among the several States."

The nature and purpose of the statute amended,—the Sherman Act,—requires that any amendment thereto which in anywise relaxes the statutory declaration of public policy should be strictly construed. As has been said, "the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute."³ Indeed, upon any basis, (except possibly from applying the statute, not as enacted, but upon conjecture which might arise from some features of its legislative history), it is difficult to perceive any basis for enlarging the plain meaning of its language. But we are all agreed that there is no occasion here for consideration of the legislative history of the Amendment, and therefore whatever may have been the intention of its sponsors, we are controlled by the amendment as actually enacted. The amendment deals only with "contracts and agreements" and in the absence of any enlarging provision, furnishes no basis for incorporating as an exemption from the Sherman Act any provision of a State Statute which restrains interstate commerce by provisions applicable to those who have not made the "contracts and agreements." My position is illustrated by the observation that the Miller-Tydings Amendment goes no further than to remove the taint of illegality attendant upon such contracts as to interstate transactions (*Dr. Miles Medical Co. v. Park and Sons Co.*, 220 U.S. 373) as is removed by section 1 of the Louisiana Act now in question as to intrastate transactions. Section 1 of the Louisiana Act relates, as likewise does the [fol. 108] Federal Act, only to establishing the legality of the *contracts* in question. That far, the two statutes are in

³ Sutherland on Statutory Construction, 3rd Ed. 1943, §4933; *U. S. v. Dickson*, 40 U.S. 141, 163.

pari materia. Section 2 of the Louisiana statute, upon which the present cause is predicated, is a substantive law of Louisiana, not a contract or agreement. I believe it may not be successfully contended that without section 2, the provisions of section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by section 1. The terms of the Federal Amendment no more embrace section 2 of the Louisiana Act than does section 1 of that Act. Thus Congress has legalized the *contract* validated by the State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law.

It is not material whether the defense be declared predicated upon the lack of State power, or upon the ground that the enforcement of a State statute will result in a Federal Court of Equity basing the exercise of its injunctive power upon grounds which are illegal because of the Sherman Act. The result properly to be reached is the same, for the Federal Court must not require action which countenances conduct contrary to Federal law. In the present case, the Court could enforce section 1 of the Louisiana Act, but could not enforce that part of section 2 relating to non-contractors if, under the circumstances, such enforcement would be contrary to the Sherman Act. It is recognized [fol. 109] that in this time when the weight of interstate commerce affects multitudinous transactions, the construction here given the Miller-Tydings Amendment greatly circumscribes the relaxation of Federal control in the enforcement of State Fair Trade Acts. However, we should apply the statute as written. This construction removes the legal difficulty to the enforcement of permissive contracts, themselves declared illegal in *Dr. Miles Medical Co. v. Park and Sons Co.*, *supra*, and likewise makes it clear that the provision of the Amendment that the making of such contracts shall not be an unfair method of competition, removes further infirmity theretofore found inherent in such contracts. *Federal Trade Commission v.*

Beech-Nut Packing Co., 277 U.S. 441. If the Congress determines it wise to further relax the prohibitions of the Sherman Act, it can very easily do so by merely excepting from its operation all provisions of State Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction.

It is also clear that as to those who have not executed contracts or agreements validated by the Amendment, there may be combinations or conspiracies in illegal restraint of trade which have a basis over and beyond that afforded by the execution of contracts and agreements as such. If so, such contracts being legally permitted, of course would not themselves evidence any illegality of agreement, but neither would they raise a sanctuary for those who, though parties to legal contracts, might illegally combine or agree to restrain interstate commerce so far as non-contractors are concerned. This was recognized by the parties and the trial Court. That Court, being of the opinion that the Miller-Tydings Amendment, construed in the light of its [fol. 110] legislative history, in effect adopted the State Fair Trade Statute (as do my colleagues, but without resort to legislative history), expressly found as a conclusion of law, "defendants have attempted to show that plaintiff's actions in fixing retail prices constitute a restraint of trade between the states. No finding on this feature of the case is required, however, in view of the Miller-Tydings Amendment to the Sherman Anti-Trust Act." For the reasons I have stated, I do not accept this view. The proper disposition of this case would require us to adjudge that the Court was in error in holding that the Amendment removed the protection of the Sherman Act from non-contractors. He should have considered and adjudged the defendants' contention that, as to them, non-contractors, the plaintiffs' conduct constituted an illegal restraint of commerce between the states, at the same time giving to the plaintiffs the benefit of the Amendment so far as applicable to parties entering into the permitted price maintenance contracts. We should not evaluate the facts, which must be done in order to apply the law, in the first instance. I would reverse the judgment of the trial Court with direction that the case be thus heard and concluded.

[fol. 111]

JUDGMENT

Extract from the Minutes of July 27, 1950.

No. 13163

SCHWEGMANN BROTHERS, ET AL.,

versus

SEAGRAM DISTILLERS CORPORATION

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Schwegmann Brothers, and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

“RUSSELL Circuit Judge, dissents.”

[fol. 112] PETITION FOR REHEARING FILED—August 10, 1950

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 13,162

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

CALVERT DISTILLERS CORPORATION, Appellees

CONSOLIDATED WITH

No. 13,163

SCHWEGMANN BROTHERS, ET AL., Appellants,

versus

SEAGRAM-DISTILLERS CORPORATION, Appellees

PETITION FOR A REHEARING

Appellants in the above styled causes represent that they are aggrieved by the majority opinion filed July 27, 1950,

and petition this Honorable Court to grant a rehearing on the following grounds:

[fol. 113]

I.

Respectfully and with all due deference, appellants submit that the majority of this Honorable Court misconceived the principal issue of this litigation. The issue, as counsel see it, is not the effectiveness of the Miller-Tydings Amendment to relieve from the prohibitions of the Sherman Act resale price maintenance by *contract*. Rather, the issue is the effectiveness of the Amendment with respect to resale price maintenance over and beyond contracts—*against non-contracting parties*.

II.

In the trial of this case, in the argument before the District Court, in the briefs and in the argument before this Honorable Court, counsel for appellants and counsel for appellees did not differ as to what constitute the issues in this litigation. Counsel for appellants and apparently counsel for appellees had no notion that this Honorable Court would regard as the principal issue before it the question: "whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act resale price maintenance contracts". Prior to the filing of the majority opinion, this conception of the issue was expressed only by the Presiding Judge, briefly, without exposition, and then only in the course of the closing argument of counsel for appellees. It is respectfully submitted, therefore, that the determination of what really constitutes the issue was not given consideration by this Honorable Court commensurate with the importance of the case.

[fol. 114]

III.

There is a basic inconsistency in the majority opinion. The opinion states that the Miller-Tydings Amendment is plain and unambiguous. But the effect of the decision is that the word "contracts" as used in the Amendment does not mean contracts. *In effect, according to the majority opinion, "contractual" includes "non-contractual"—just as if "navigable" should include "non-navigable" and "negotiable" should include "non-negotiable".* According to the

majority opinion, non-contracting parties must bear the same burdens as contracting parties.

Counsel reiterate, and the Court has found, that the Amendment is plain and unambiguous. In its common meaning and in its technical legal meaning the term "contract" means an agreement, to do or to refrain from acts, between two or more persons, binding those persons and only those persons. Any other view of contracts ignores the meaning of the word and repudiates the long history of contracts as distinguished from status fixed by statute.

Wherefore, petitioners pray that this Honorable Court grant a rehearing in these causes and that it adopt the minority opinion as the majority opinion of this Court.

Respectfully submitted, (signed) Paul O. H. Pigman,
Wisdom and Stone, John Minor Wisdom, Saul
Stone, Paul O. H. Pigman, Attorneys for Appel-
lants.

[fol. 115] BRIEF STATEMENT IN SUPPORT OF PETITION FOR
REHEARING

I.

Respectfully, and with all due deference, it is submitted that the majority of this Honorable Court misconceived the issue in this litigation.

The majority opinion states that "both appellants and appellees, instead of coming and sticking" to the point of the case, set up "straw men", and then each "furiously . . . [layed] about to knock the other's straw man down." The "main battleground", according to the majority opinion, was:

"whether the Miller-Tydings Amendment is effective to relieve from the prohibitions of the Sherman Act, the price maintenance contracts relied on in this case."

It is certainly true that appellants did not consider this an issue; nor did appellees. There has never been any doubt that the Amendment relieves resale price maintenance contracts from the Sherman Act. There has never been any dispute over the application of the Amendment to contracts, that is, the enforceability of resale price maintenance between contracting parties. The dispute is over the application of the Amendment to price-fixing over and

beyond contracts, that is, the enforceability of resale price maintenance against non-contracting parties.

This case was carefully prepared by counsel for both sides. Counsel for appellees were counsel for Pepsodent [fol. 116] Company in *Pepsodent v. Krauss*, 56 F. Supp. 922 (D. C. La. 1944). Judge Borah, author of the opinion in that case and now a member of this Honorable Court, based his decision on the legislative history of the Amendment. In the instant case, the District Court relied on *Pepsodent v. Krauss*. There is a manifest reason why appellees were so anxious to go into the legislative history.¹ Appellees feared that they would be out of Court, if restricted to the plain meaning of the Amendment. They had to go beyond the statute in search of some justification for asserting that an exception,² in terms limited to contracts, includes non-contractual resale price maintenance imposed by statute on third persons not parties to the contracts. As expressed in the minority opinion:

“Indeed, upon any basis (except possibly from applying the statute, not as enacted, but upon conjecture

¹ Appellants reaffirm their position that the language of the Amendment is so clear that resort to the legislative history is improper. Appellants also reaffirm, however, that a study of the legislative history leads irresistibly to the conclusion that the Amendment was intended to validate resale price maintenance only against willing contracting parties. As conclusive proof one need go no further than a comparison of the Miller-Tydings Amendment and a typical Fair Trade Law. The Amendment tracks Section 1; it omits any reference to non-signers (Section 2). If one goes further, one finds that the reason for the omission of any reference to non-signers is that the Amendment substantially follows the Capper-Kelly bills introduced in Congress in 1927, 1928, and 1931—*prior to the existence of any non-signer clause in any state statute, and actually prior to the passage of any fair trade law at all.*

² It is respectfully submitted that the majority of this Honorable Court did not give sufficient weight to the principle of statutory construction that an exception to a declaration of public policy should be strictly construed.

which might arise from some features of its legislative history), *it is difficult to conceive any basis for enlarging the plain meaning of its language.*" (Italics supplied.)

[fol. 117] It is respectfully submitted that the majority of this Honorable Court erred in not recognizing as the real issue:

"Can or does an exception to the Sherman Act covering 'contracts and agreements' be extended to cover non-contractual, statutory resale price maintenance imposed on non-signers by the substantive law of the state, not by contract or agreement—in transactions affecting interstate commerce?"

II.

The majority opinion states that "the proponents of . . . the fullest scope for state fair trade statutes needed only the passage of a federal act relieving . . . contracts from the . . . Sherman Act". Counsel respectfully submit that this reasoning begs the question, since it rests on the assumption that the meaning of contracts may be extended to include what, for lack of a better term, may be called non-contracts. If, however, as both the majority and minority of the Court agree, the legislative language is plain and unambiguous, the proponents of fair trade legislation needed something more than an exception for "contracts and agreements". As stated in the minority opinion, they needed an exception covering provisions of a state statute "applicable to those who have not made the contracts and agreements".

The Sherman Act unquestionably is an obstacle to resale price maintenance affecting interstate commerce. The Miller-Tydings Amendment removes that obstacle with respect to parties to a resale price maintenance contract. It does not follow, however, that removal of the obstacle [fol. 118] as to contracting parties has any effect on non-contracting parties.

The first Fair Trade statutes, from 1931 to 1933, validated, in intrastate transactions, resale price maintenance contracts between the parties *but contained no non-signer clause*. These contracts were ineffective against non-contracting retailers and did not accomplish their purpose of

eliminating price competition. In 1933, California added Section 2 to its Fair Trade Law, binding non-signers. Other states, including Louisiana, adopted Fair Trade laws which follow almost identically the language of the amended California statute. Section 2, the non-signer clause, does not validate the contracts; that was already accomplished by Section 1. Section 2 superimposes an independent statutory obligation that is outside of the legal concept of a contract. Proponents of price-fixing found it necessary to bind non-contracting parties by statute in an intrastate transaction; it is equally necessary to bind non-contracting parties by statute in an interstate transaction (for purposes of avoiding the Sherman Act).

The minority opinion makes a forceful and convincing point: it would have been simple for Congress to have excepted from the Sherman Act resale price maintenance in accordance with "all provisions of state Fair Trade Acts, including their planned restrictive operations against sales by those in no wise obligated by any contractual relation restriction". Congress did not. The Amendment excepts only the contract clause embodied in Section 1. The Amendment tracks Section 1, word for word, but omits any reference to non-signers (Section 2). As the minority opinion points out cogently:

"I believe it may not be successfully contended that without Section 2, the provisions of Section 1 could be in any wise applied to retailers who had not seen fit to execute price maintenance contracts legalized by Section 1. The terms of the Federal Amendment no more embrace Section 2 of the Louisiana Act than does Section 1 of that Act. Thus Congress has legalized the contract validated by the State law, but not every provision of the statute . . . We should apply the statute as written."

III.

Apparently as a peripheral predicate for its conclusion, the majority opinion makes several references to the inherent power of the states to enact Fair Trade legislation, for example:

"[It was not necessary] to seek from Congress permission or authority to enact fair trade statutes. It

would have been a complete misconception of the source of state power . . . In insisting, therefore, that the Miller-Tydings Amendment is ineffective . . . as to non-signers, because it . . . does not in terms grant to the states power to make those laws effective against non-signers of such contracts, appellants wholly mis-conceive the issue."

Appellants do not question a state's power to enact Fair Trade legislation, regulating intrastate transactions, against signers and non-signers. But a state's authority is limited by the commerce clause of the United States [fol. 120] Constitution, the Sherman Act and any other federal statute in the field of interstate commerce. Proponents of the legislation found it necessary to secure a federal exception covering contracts; the state's inherent powers did not protect contracts in restraint of interstate trade, regardless of the validity of such contracts under state law. For the same reason that it was necessary to except contractual resale price maintenance from the Sherman Act, it is necessary also to except non-contractual resale price maintenance independently imposed by state statute on non-signers—regardless of a state's inherent intrastate power.

IV.

With respect and deference, counsel for appellants confess an inability on their part to understand the reason for the conclusion expressed in the majority opinion.

If the majority opinion is analyzed and an effort is made to reduce it to the terms of a syllogism, one would find as a major premise that the Amendment removes Sherman Act restrictions, in transactions affecting interstate commerce, on contracts which are valid in intrastate transactions. Appellants do not dispute this premise. The stated conclusion is: since a non-signer is bound in an intrastate transaction, he is also bound in an interstate transaction. The major premise, standing alone, does not support the conclusion, for the reason that there is no necessary relationship between a fair trade contract validating resale price maintenance by the contracting parties and an independent statutory provision imposing resale price maintenance on non-contracting parties.

[fol. 121] There is no express minor premise to close the hiatus between the major premise and the conclusion. As a matter of fact, no minor premise can be formulated to support the conclusion if, as is agreed, the Amendment plainly and unambiguously refers only to "contracts or agreements".

Counsel for appellants do not contend that all reasoning must be syllogistic or that an opinion of this Honorable Court to be sound must be capable of being subjected to the formalism of a syllogism. Counsel do contend, most respectfully, that against the yardstick of a syllogism, or, as stated in the minority opinion, "upon any basis (except possibly . . . conjecture which might arise from features of its legislative history)", the majority opinion is unclear.

V.

The decision rendered in this case is a major one in American jurisprudence, one that will be studied, analyzed, and weighed by all interested in the legal aspects of restraint of trade, statutory construction, and the interplay of intrastate and interstate transactions. But its greater importance lies in the field of practical economics. The decision will have a direct effect on the merchandising methods of retailers who, like Schwegmann Brothers, by efficient operations, a volume business, and a serve-yourself system, are able to reduce their costs and pass on corresponding savings to customers. The decision will be a green light for manufacturers and distributors who have refrained from fair trading their products for fear of just such litigation as this litigation. It will have a direct effect on customers who will have to pay more for their [fol. 122] goods than the goods are worth in a free market. In normal times this would be serious enough. In the present crisis detonated by the Korean war, perhaps the first of many crises or the start of one of long duration, in a period of rapidly rising costs of living, the danger of inflation omnipresent—the seriousness of a decision broadening the scope of a statute inherently inflationary multiplies in geometric progression.

Counsel would not presume even to intimate that these effects should enter into the Court's consideration of the *merits* of this cause. Counsel do urge, earnestly and re-

spectfully, that the inescapable economic effects of the decision underscore the urgency of appellant's petition for rehearing and warrant a reexamination of the correctness of the majority opinion.

Respectfully submitted, (signed) Paul O. H. Pigman,
Wisdom and Stone, John Minor Wisdom, Saul
Stone, Paul O. H. Pigman, Attorneys for Appel-
lants.

This is to certify that on the 9th day of August, 1950, I served personally on the attorneys for the appellee, the petition for rehearing and brief statement in support of the petition.

(signed) Paul O. H. Pigman, Attorney for Appel-
lant.

This is to certify that this petition is filed in good faith and not for purposes of delay.

(signed) Paul O. H. Pigman.

[fol. 123]

ORDER DENYING REHEARING

Extract from the Minutes of September 15, 1950.
No. 13163

SCHWEGMANN BROTHERS, ET AL.,

versus

SEAGRAM DISTILLERS CORPORATION

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby denied.

RUSSELL, Circuit Judge, Specially Concurring:

Since my Brethern remain firm in their original opinion, no purpose could be served by the grant of a rehearing, and I therefore concur in the order denying the same.
[fol. 124] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 125] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1950

No. 443

ORDER ALLOWING CERTIORARI—Filed February 26, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3545)